TRANSCRIPT OF REC

ATES.

CLARK,

SUPREME COURT OF THE UNITED STATES.

No. 885.

ALBERT T. BABBITT, APPELLANT,

vs.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. CLARK, AND GEORGE P. BURNETT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 20, 1860.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and western division of the Northern district of Ohio, begun and held at the court rooms in the city of Toledo, in said district, on the first Tuesday in December, one thousand eight hundred and seventy- nine, and of the Independence of the United States of America the one hundred and fourth year—present, the honorable Martin Welker, district judge, sitting as circuit judge—among the proceedings had were the following, to wit:

2 There was filed in said court by the appellant, on the fifth day of June, A. D. 1879, the following transcript, to wit:

3 PARKER P. CLARK ET AL. } 18036.
vs.
ALBERT T. BABBITT. }

Pleas before the court of common pleas within and for the county of Lucas and State Ohio, at a term thereof begun and held at the court house in the city of Toledo on Monday, the 28th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, Hon. Reuben C. Lemmon, Hon. Birdseye W. Rouse, Hon. William F. Lockwood, presiding judges.

Be it remembered, that heretofore, to wit, on the 25th day of October, 1878, plaintiffs, by their attorneys, filed in said court their petition in the above entitled cause, which petition is in the words and figures as follows, to wit:

Petition.

Lucas County court of common pleas.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. Clark, & George B. Burnett, plaintiffs, } *against* ALBERT T. BABBITT, DEFENDANT. }

4 The plaintiffs in this action, Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, say that at a term of the court of common pleas in and for the city and county of New York, in the State of New York, begun and held on the 10th day of June, A. D. 1878, to wit, on the day of said month of June, by the consideration of said court, they recovered a judgment against the said defendant, Albert T. Babbitt, in a certain action then pending in said court, wherein said Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett were plaintiffs and the said Babbitt and one Edgar A. Weed were defendants, of which action, and the person of said defandant Babbitt, said court then and there had jurisdiction.

That said judgment, so recovered and obtained by these plaintiffs, against said Babbitt, was for the sum of twenty-two hundred & sixty dollars & sixty cents, damages, and with costs of suit, amounting to three hundred sixty-six and $\frac{20}{100}$ dollars, making in all the sum of two thousand six hundred twenty-six and $\frac{80}{100}$ dollars.

That said judgment is now in full force, and is wholly unre-
5 versed, and is unsatisfied and unpaid, except the following payments, to wit, one of three hundred eleven & $\frac{92}{100}$ dollars, and a

further payment of , made, to wit, October 1st, A. D. 1878; that by the laws of said State of New York, said judgment bears interest from its rendition at the rate of seven per cent. per annum. Wherefore plaintiffs say that is due and unpaid upon said judgment the sum of fifteen hundred eighteen & $\frac{49}{100}$ ($1,518$\frac{49}{100}$) dollars, with interest on the same from October 1st, A. D. 1878, at the rate of seven per cent. per annum, for which amount they ask a judgment against the said defendant.

KENT, NEWTON & PUGSLEY,
Plaintiffs' Attorneys.

STATE OF OHIO,
Lucas County, ss:

John T. Newton, being duly sworn, says that he is an attorney of the plaintiffs in the action aforesaid; that all of said plaintiffs are non-residents, & absent from the State of Ohio, & that he believes the statements contained in the foregoing petition are true; and he further makes oath that the action aforesaid is founded upon a judgment obtained by plaintiffs against the defendant, Albert T. Babbitt, in the court
6 of common pleas in and for the city and county of New York, in the State of New York, heretofore, to wit, on the day of June, A. D. 1878, the same being for two thousand two hundred and sixty dollars & sixty cents, damages, and three hundred sixty-six dollars and twenty cents cost of suit, and making in all the sum of two thousand six hundred twenty-six $\frac{80}{100}$ dollars, and which judgment is in full force and unreversed, and is wholly unpaid, excepting that the sum eleven hundred & forty-eight dollars and ninety-two cents has been received and applied to the payment of the same; that said claim is just, and affiant believes that plaintiffs ought to recover of said defendant in this action on said claim the sum of fifteen hundred & eighteen dollars and forty-nine cents; and affiant further says that said defendant, Babbitt, is a non-resident of said State of Ohio, and that he has good reason to and does believe that the Commercial National Bank of Toledo, Ohio, a corporation of the county of Lucas & State of Ohio, is indebted to the defendant, Babbitt, on account of moneys by him deposited with said bank, and so has property of the defendant in its possession to the amount & value of fifteen hundred dollars or more.

JOHN T. NEWTON.

7 Sworn to before me and signed in my presence this 24th day of October, 1878.

[SEAL.] FRANK E. COLE,
Notary Public.

Said petition was endorsed as follows, to wit:

Good for costs.

NEWHOUSEL BROS.

Lucas County court of common pleas.

PARKER P. CLARK & OTHERS, PLAINTIFFS,
against
ALBERT T. BABBITT, DEFENDANT.

John T. Newton, being duly sworn, says that he is an attorney of plaintiffs in the foregoing action; that the defendant, Albert T. Babbitt,

is a non-resident of the State of Ohio, & that service of summons cannot be made upon him within said State, and that this action is brought against defendant as a non resident having debts owing to him and having property in said State.

JOHN T. NEWTON.

Subscribed & sworn to before me this 24th day of October, A. D. 1878.
[SEAL.] FRANK E. COLE,
Notary Public.

Attached to said petition and filed therewith was precipee, of which the following is a true copy, viz:

8 Lucas County court of common pleas.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. Clark, and George B. Burnett, plaintiffs,
against
ALBERT T. BABBITT, DEFENDANT.

Clerk: Issue a summons & order of attachment in the action aforesaid, and garnishee the Commercial National Bank of Toledo, returnable according to law; amount claimed, $1,518\frac{49}{100}$ *dollars*, and interest on the same from October 1st, 1878.

KENT, NEWTON & PUGSLEY,
Pl'ffs' Att'ys.

Thereupon summons and order of attachment in said cause were issued by the clerk of said court, which summons is in the words and figures as follows, to wit:

THE STATE OF OHIO:
Lucas County, ss:

To the sheriff of Lucas county:

You are commanded to notify Albert T. Babbitt that he has been sued by Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, in the court of common pleas of Lucas County, and that unless he answer by the 23d day of November, A. D. 1878, the petition
9 of the said plaintiffs against him filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 4th day of November, A. D. 1878.

Witness M. J. Enright, clerk of said court, and the seal thereof, at Toledo, this 25th day of October, A. D. 1878.
[SEAL.] M. J. ENRIGHT, *Clerk*,
By M. V. FISH, *Deputy Clerk.*

Which said summons was indorsed as follows, to wit:

Summons in action for amount claimed $1,518\frac{49}{100}$ dollars, and interest on the same from October 1st, 1878.

KENT, NEWTOM & PUGSLEY,
Attorneys for Plaintiffs.

Said order of attachment is in the words and figures as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:

To the sheriff of Lucas County, greeting:

You are hereby commanded to attach and safely keep the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects in your county of Albert T. Babbitt not exempt by law from being applied to the payment of the claim of the plaintiffs, Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, or so much thereof as will satisfy plaintiffs' claim for fifteen hundred eighteen and $\frac{42}{100}$ dollars ($1,518\frac{42}{100}$) and interest on the same from October 1st, 1878, and also for fifty dollars, the probable cost of this action, and that you make due return of this order on the 4th day of November, A. D. 1878.

Witness M. J. Enright, clerk of the court of common pleas of said county of Lucas, this 25th day of October, A. D. 1878.

[SEAL.]

M. J. ENRIGHT, *Clerk*,
By M. V. FISK, *Deputy*.

Said order of attachment is indorsed as follows, to wit:

MR. SHERIFF: Notify, as garnishee, The Commercial National Bank of Toledo.

M. J. ENRIGHT, *Clerk*,
By M. V. FISK, *Deputy Clerk*.

KENT, NEWTON & PUGSLEY,
Attorneys.

On the 4th day of November, A. D. 1878, said summons was filed in said court with the sheriff's return thereon, written as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:

Received this writ Oct. 25th, 11.30 a. m., 1878, and pursuant to its command, I summoned, on the 31st day of October, 1878, the within-named defendant, Albert T. Babbitt, by leaving a true and certified copy of the same, with the indorsements hereon, at his usual place of residence.

S. S. LINTON, *Sheriff*,
By L. A. CAMPBELL, *Deputy*.

On the 4th day of November, 1878, said order of attachment was filed in said court, with the sheriff's return thereon, written as follows, to wit.

OFFICE SHERIFF, LUCAS COUNTY, OHIO,
Toledo, Oct., A. D. 1878.

Received this order on the 25 day of Oct., 11.30 a. m., A. D. 1878, and agreeably to the command thereof, I did, on the 25th day of Oct., A. D. 1878, in the presence of C. H. Harley and C. H. Parsons, two freeholders of said county, attach the property described in the schedule marked A, hereto attached and made part of this return, and having first administered to said freeholders the oath

required by law to make a true inventory and appraisement of said property, we proceeded to make such inventory and appraisement, as will fully appear by reference to said schedule A.

SCHEDULE A.

We, S. S. Linton, sheriff of Lucas County, and C. H. Harley and C. H. Parsons, two freeholders of said county, do truly inventory and appraise the property attached under the foregoing order, as the property of Albert T. Babbitt, and hereinafter described and marked Schedule A.

(Schedule A.)

Invoice of Md'se. A. T. Babbitt.

Ms. fur hats.

1134	2/3	doz	15		10
2351	1				9
2603	2 1/4		15	33	75
1185	1 1/12		12		13
226	1 2/3		18		30
1006	1 1/12		9		8 25
761	2 1/4		9		20 25
497	2 10/12		7	50	21 25
5563	2/3		12		8
5669	7/12		15		8 75
13					
2073	1 1/2		15		22 50
2176	1 7/12		15		23 75
1515	10/12		15		12 50
2440	2/3		15		10
258	5 1/2		15		6 25
383	2/3		18		12
1669	7/12		15		8 75
1631	11/12		15		13 75
2071	1 5/12				
5380	1/2		15		21 25
6579	1/2		15		7 50
5988	1 1/4		15		7 50
5991	1 1/6		12		14
346	1 1/2		9		13 50
1970	1 1/12		6		6 50
3192 } 3191 }	5 7/12		6		33 50
4248	1 1/2		6		9
491	7/12		18		10 50
5372	3 11/12		10	50	41 13
5280	2 1/6		12		26
847	1 3/4		12		21
266	1 1/3		6		8
4316	3 1/6		4	50	14 25
					520 38

Ms. wool hats.

1414	$\frac{7}{12}$	doz	7 50	4	38
1412	$1\frac{1}{2}$		9	13	50
6536	1		4 50	4	50
336	$1\frac{1}{12}$		7 50	8	12
270	$4\frac{1}{12}$		7 50	36	25
1407	$1\frac{5}{12}$		7 50	10	63
6308	$2\frac{1}{12}$		8	16	67
6431	$1\frac{1}{12}$		6	6	50
1288	$1\frac{1}{6}$		6	7	
328	$\frac{10}{12}$		6	5	
6067	$1\frac{1}{2}$		6	9	
331	$1\frac{7}{12}$		7	7	58
487	$1\frac{2}{3}$		6	10	
2612	$\frac{10}{12}$		7	5	83
				144	96

14 *Boys & children's wool hats.*

1649	$2\frac{10}{12}$	doz	6	17	
4449	$1\frac{3}{4}$		2	3	50
337	$3\frac{1}{12}$		3	9	25
830	$2\frac{6}{6}$		6	13	
1542	$1\frac{1}{6}$		5	5	83
2516	$1\frac{5}{12}$		4	5	66
1467	$\frac{11}{12}$		5	4	58
2667	$2\frac{1}{12}$		5	10	42
353	$1\frac{7}{12}$		2	3	16
1362	$1\frac{1}{6}$		2	2	33
1080	$1\frac{10}{12}$		3	5	50
355, 5628, 308, 931, 5629	$5\frac{5}{12}$		2	10	83
2124	$1\frac{1}{4}$		4	5	
4440	$2\frac{1}{6}$		2	4	33
2643	$5\frac{1}{4}$		4	21	
2555	$2\frac{5}{6}$		5	11	67
399	$4\frac{10}{12}$		3	14	50
2628	$2\frac{1}{4}$		4	9	
2050, 2053	$1\frac{1}{12}$		3	3	25
2287	$1\frac{11}{12}$		3	5	75
5584	$\frac{5}{12}$		2		83
5631	$\frac{2}{3}$		2	1	33
1789	$1\frac{10}{12}$		3	5	50
				173	22
2576	$3\frac{1}{2}$		4	14	
2011	$7\frac{1}{12}$		4	28	33
848	$1\frac{7}{12}$		2	3	17
793	$\frac{3}{4}$		3	2	25
705	$1\frac{5}{12}$		2	2	83
5763	1		2	2	
2810	1		3	3	
2015	$2\frac{11}{12}$		2	5	83
				234	63

Ms. & bs. full caps.

4 38	447	$3\frac{1}{6}$	doz	3	18	50
13 50	2493	$4\frac{3}{4}$		3	14	25
4 50	6304	$1\frac{1}{2}$		3	4	50
8 12	5572	$1\frac{1}{4}$		2	2	50
36 25	2494	$2\frac{1}{4}$		3	6	75
10 63	1484	$1\frac{1}{6}$		3	3	50
16 67	6220	$2\frac{1}{2}$		2	5	
6 50	413	$4\frac{1}{12}$		2	8	17
7	5567	$2\frac{3}{4}$		3	5	25
5	6303	$3\frac{1}{12}$		2	6	16
9	1485	$3\frac{1}{3}$		3	10	
7 58	6415	$3\frac{5}{12}$		3	16	25
10	5611	1		1	1	
5 83	2040	$1\frac{1}{12}$		3	5	75
	1482	$1\frac{1}{2}$		3	4	50
44 96	1510	$2\frac{1}{6}$		3	6	50
	1425	$2\frac{1}{3}$		4	8	67
17		$\frac{1}{3}$		3		50
3 50	419	$\frac{3}{4}$		3	2	25
9 25	6306	$\frac{1}{2}$		4	2	
13	6301	$\frac{1}{3}$		3	1	
5 83	6338	$2\frac{1}{6}$		3	6	50
5 66	6300	$1\frac{1}{3}$		3	4	
4 58	2817	$1\frac{1}{2}$		4	6	
10 42	446	$3\frac{1}{12}$		3	9	25
3 16						
2 33						
5 50	15					
	2034	$1\frac{1}{3}$		5	7	50
10 83	412	$4\frac{1}{12}$		3	12	25
5	379	$1\frac{1}{12}$		2	3	83
4 33	407	$3\frac{1}{3}$		2	6	50
21						
11 67					188	83
14 50						
9	16		For'd		188	83
3 25	403	$12\frac{1}{3}$	doz	3	5	
5 75	393	$1\frac{10}{12}$		3	5	50
83	6298	$\frac{1}{4}$		6	4	50
1 33	1489	$\frac{1}{3}$		3	1	50
5 50	1807	$\frac{1}{3}$		3	2	
	394	$1\frac{1}{12}$		3	3	25
173 22	410	$1\frac{1}{12}$		3	2	50
14	5667	$\frac{1}{4}$		3		75
28 33	1428	$\frac{1}{3}$		4	1	33
3 17	1082	$1\frac{5}{12}$		3	4	25
2 25	2029	$\frac{5}{12}$		5	2	50
2 83	404	$1\frac{1}{12}$		4	2	33
2	412	$1\frac{5}{12}$		3	1	25
3	2039	$1\frac{5}{12}$		3	4	25
5 83	1620	$2\frac{1}{6}$		2	4	33
	403	$\frac{10}{12}$		3	2	50
234 63	380	$1\frac{1}{12}$		3	3	25

409	2		3		5 50
405	1		3		2 75
360			3		1
2490	1		4		5 33
	6	samples	1	50	9 25
					263 65

Ms. & bs. winter caps.

6218		doz	2		1
2300	1		3		3 50
2311	2		2		5 66
2372			1	50	1 25
2336	2		6		14
6218	1		2		4 33
2337			3		1 50
2223	3		2		7
		Scotch	2		1
889	1		2	50	2 50
2234	1		4		7 33
2255	2		3		8
					57 07
17		Am't for'd			57 07

Winter caps cont'd.

11011					
959	1	doz	5		9 58
2294			9		2 25
2253			6		1 50
	4	nutria caps		50	2
6359			6		3 50
6385			6		1 50
1206	3		1		3
	2	turbans		75	1 50
2361	4		2		9 33
995	1		3		5 75
2379			3		1 75
6333			4		1 33
597	1		3		3
2254	1		2	50	3 54
1126			6		3 50
	1		1		1 17
6312			3		1 25
2257			6		1 50
5257	1		5		8 33
6335			9		5 25
6381			6		4
3595			9		4 50
1158			3		1 25
6119			9		2 25
235			7		3 50

2317	7		12		7
2250	1		6		5
6379			6		4
967	1		5		6 25
2357			4		2 33
2355			5		4 58
2218	1		2	50	3 75
2258			4		3 65
6406	1		10		11 66
2226			2		67
2220	1		3		3 50
2335	2		5		13 33
6376	1		9		10 50
987	1		2	50	4 38
					223 72
18		For'd			223 72
988	1		2	50	4 37
2348	1		5		5 42
1093	1		9		13 50
2211	2		5		10 83
980	1		2	50	4 79
6358	2		3		8 50
			4	50	4 12
2339	2		2	50	5 20
2298	5		2		10 33
2311	2		2		4
2300	1		3		5 50
980	1		2	50	4 17
2381	1		4		5 25
988	1		2	50	2 50
2209	11		5		5 83
2302	1		2	50	2 71
2376	1		4		4 66
					325 41

Gloves.

110	3	doz. buck. gaunts	9		30
703		" " mitts	6		4
79	1	" bs. " gloves	2		1 83
76	1	" Albert caps	9		15
50	1	" kid	4	50	3 75
545	1	" chinchilla	4	50	4 12
		" buck. P. gaunts	5		2 66
43	1	" beaver top	4		3 67
	2	" ladies' castor gaunts	6		16 00
134		" " " gloves	7		4 08
	2	" bs. wool mitts	3		6 50
1102		" dr'b gloves	6		4 50
x x		" light buck	6		2 50
		" "	6		1
793		" ladies' castor	6		4
110	3	" " "	6		20

¼	doz. buck. mitts	12		3	
17	pr. green kids		10	1	70
1	lot odd gloves	1	50	1	50
job lot	"	1		1	
1½	doz. buck	10	50	9	62
				140	43
19	For'd			140	43
6371	1½ doz. buck. gloves	9		17	25
100	1 " " "	12		12	
6	pr. " "		30	1	80
				171	48
147	umbrellas		50	73	50
111¾	doz. ear muffs		60	67	05
1	lot of muff tassels	2		2	
16	trunks		50	8	
	furs				
4	sets child's wht. ast	1	50	6	00
1	cony	2		2	00
12	sett Alaska com. C. L	1	25	15	
6	" " M. & B. S. L	2	50	15	
2	" " muffs	1	25	2	50
12	" blk. opp	1	25	15	
35	" "	1	37½	48	13
1	" muff		50		50
5	" " & boa	1	50	7	50
3	" coon muff "	2		6	00
1	seal "	5		5	
1	" "	8		8	
1	" "	7		7	
2	" "	4		8	
1	coon "	1		1	
2	Alaska "	1		2	
1	seal Alaska sett M. & B	12		12	
1	blk. martin	5		5	
1	seal sett	14		14	
1		10		10	
1		10		10	
3		8		24	
1	misses	6		6	
1		10		10	
1		8		8	
				247	63
20	For'd			247	63
2	rat muffs		75	1	50
2	possum		50	1	
4	wat. R		75	3	
1	coon muff	1	25	1	25
3	stagey mink muff	1	75	5	25
2	" "	3	50	7	00
3	" "	3		9	
1	ladies' seal hat	4		4	

1	gents " cap	4		4
1	" " "	6		6
10	bs. pieced " "		75	7 50
2	misses sk'tg "	1		2
6	gents. pc'd "	1		6 00
1	sett seal	14		14
1	Russian hair sett	3		3
1	sett seal	8		8
1	beaver boa	1		1
3	sett seal	9		27
1	" blk martin	6		6
1	" hair	4		4
2	" lynx	5		10
3	" Russian hair	3		9
3	" coon	4		12
4	" mink	6		24
1	" blk martin	3		3
1	" ast	2		2
1	" Russian hair	2		2
3	" mink	5		15
1	" " muff	4		4
4	" " "	3		12
2	" " "	5		10
4	" Alaska satin line	3	50	14
6	" " C. & L	2	50	15
2	" " C. & M	1	50	3
1	" " muff		75	75
5	misses corny	1		5
10	childs' "		50	5
4	" beaver	4		16
	" wht. corny	2		22
				551 88
21	Am't for'd			
	Furs cont'd			551 88
2	b'lk muffs	1		2
2	setts opp	1		2
3	" Alaska	2	50	7 50
1	" wh't	1	50	1 50
1	" mink	10		10
3	" "	6		18
1	" muff	3	50	3 50
4	caps		25	1 00
1	job lot child's fur	2		2
1	doz. wh't coney caps	2		2
$\frac{10}{12}$	" " " "	3		2 50
$\frac{4}{3}$	" " " "	3		1
1	" " "		50	50
7	" " "		25	1 75
$1\frac{1}{3}$	" " " hoods	2		2 66
19	ladies' p'c'd seal caps		75	14 25
4	" " "	1	50	6
10	" coney "		50	5
8	setts child's furs		25	4
3	" " "		50	1 50
2	" " "	1	25	2 50

1	setts child's furs	1 50	1 50	
9	" wh't coney	25	2 25	
5	" " "	50	2 50	
1½	doz. caps	1	1 50	
2	lynx boa	1 50	3 00	
1	mink "	3	3	
1	seal "	6	6	
1	" sack, misses	15	15	
1	coney sack	2	2	
6	" " wh't, child's	1 50	9	
5	" " " "	2	10	
2	" " " "	3	6	
2	pr. beaver gaunts	4 50	9	
6	" " "	2	12	
1	" " "	1	1	
1	" astrachan gaunts	1	1	
5	fur mufflers	75	3 75	
4	" "	1 25	5	
			736	54
22	For'd		736	54
6	mink collars	1	6	
9	" "	1 50	13 50	
10	" "	75	17 50	
2	martin "	75	1 50	
2	" "	50	1	
5	nat. rat "	50	2 50	
3	sat. line Alas. collars	1 50	4 50	
14	" "	75	10 50	
4	" "	1	4	
1	job lot "	10	10	
1	boa	50	50	
1	sett Alaska	1 50	1 50	
1	" "	2 50	2 50	
1	" coney	2	2	
3	" "	1	3	
1	" misses	1	1	
1	" "	1 25	1 25	
2	" " coney	50	1	
1	lynx muff	1	1	
28	boa	25	7 50	
	job lot fur tr'm'g	2	2	
			820	79

Straw goods.

3¹¹/₁₂	doz. m's bro. P. L. sailor	1 50	5 88	
3¾	" b'ys wh't cast	2 25	8 44	
4382	5¹⁰/₁₂ " " " "	1	5 82	
5942	1¹/₁₂ " " " "	2 25	2 43	
1372	1⅓ " " " "	3	4	
5949	2¹¹/₁₂	2 50	7 29	

1664	1 7/12	sailor	2		3 96
1889	6 1/4	child bro. canton	2		13 84
2784	2 11/12	" " & wh't canton	2	75	8 02
2705	1 7/12	" pearl	3	50	5 54
87	2	b's canton	2	75	5 50
1890	1 7/12	" " sailor	2	25	3 56
1666	2 2/3	" "	2	50	5 83
	9	" P. L	1		9
	5 1/2	" "		75	4 44
					93 55
23		For'd			93 55
	3 1/3	misses leg. sailor		75	2 88
	1 1/12	" P. L. "		75	82
	1/2	child's trd. P. L		75	38
	1/2	" leg		75	37
	2 1/6	" "	1	50	1 75
	3 5/12	" " b's bro. sailor	1		3 43
1773	14 3/4	" Ind. Panama		60	8 95
	2 1/12	misses mix leg	1		2 08
2598	10 1/4	" bro. cor. shades	1	25	13 12
2726	8 1/3	" leg. "	1		8 33
1899	10 1/4	child's b'd P. L	1	25	13 65
1901	7 7/12	" trd. "	1	50	11 37
778	2 1/2	misses blue sailor	1	50	3 75
1579	3 1/2	Ind. Pan		75	2 38
1888	2 1/2	" "		62	1 80
2836	30	m's hat		75	22 50
	1 11/12		1		1 92
	15 1/2	" "		75	11 43
	5 2/3	" mulaga	1		5 66
	13	" hats		62	8 12
620	1 1/2	b's wh't cant	3	25	6 23
5902	2		2		4
2781	1/6	" F'ch Pan	6		1
5908	1 1/2	" mix. braid	3	50	3 21
5650	2 1/4	" wh't cant	2	50	5 62
1443	2 5/12	" " "	3		7 25
	1 1/2	child's bro. leg. trd		75	1 13
	1 1/6	" " "	1		1 33
1847	1 3/4	child's cab	2	75	4 58
1463	1 3/4	" wh't cant	2	50	4 37
5697	6 5/12	misses "	2	25	14 42
1709	1 1/6	pair	4		4 66
5700	3 1/12	sailor	2	50	7 71
1446	1/2	b's wh't cant	3	50	1 46
5957	1 1/2	misses cab	3		2 75
2703	1/2	b's bro. cant helmet	3		1 25
6	1/3	" cant	3	50	1 16
1848	2 1/6	child's cab	3	25	7 04
1720	3 1/12	b's bro. cant trd	3		10 25
1845	1/3	" whet "	2	25	93
1932	1 1/12	" marine	3	25	3 57
1464	1/12	wh't cant	2	25	2 07
					314 22

24 *Store fixtures.*

3	baskets on wheels	5		15	
6	packing tables	2		12	
1	small desk		50		50
1	willow basket		25		25
1	entry desk & fixtures	5		5	
2	hatchets, hammer and hand-saw	1	50	3	00
142	empty cases		10	14	20
1	sprinkler		25		25
1	broom & water-pail		25		25
1	nail puller & scraper	1		1	
1	step ladder	1	50	1	50
1	rocker, splint	1	50	1	50
1	chair "	1		1	
1	water cooler & stand		50		50
1	truck	2		2	
1	packing table	2		2	
1	desk, back office	3		3	
1	Detroit safe and stand	100		100	
1	letter-press & fixtures	25		25	
1	book rack	3		3	
1	" keeper's desk	40		40	
1	office stool		25		25
2	letter files	1		2	
2	glass ink-stands		25		50
1	small desk, front office	5		5	
1	bracket & match safe	1		1	
1	big desk	50		50	
1	lounge	10		10	
1	large arm chair, le'ther	5		5	
1	" " splint bottom	2		2	
1	splint back chair	3		3	
1	clock	15		15	
1	sewing machine, Howe	5		5	
1	coal stove, morning glory	5		5	
	Office carpet & matting	6		6	
				340	70

25 *Recapitulation.*

M's fur hats	520	38
M's wool hats	144	96
B's & child's wool hats	234	63
M's & b's fall caps	263	65
M's & b's winter caps	325	41
Gloves & mittens	171	48
Umbrellas	73	50
Ear muffs	67	05
Muff tassels	2	
Trunks	8	
Furs	820	79
Straw goods	314	22
Fixtures	340	70
	3,286	77

Given under our hands this 29th day of October, 1878.

C. H. PARSONS,
C. A. HORLEY,
Appraisers.

Given under our hands this 29th day of October, A. D. 1878.

S. S. LINTON,
Sheriff.

26 On the 11th day of November, 1878, there was filed in said court an affidavit of James A. Tenny, which affidavit is in the words and figures as follows, to wit:

Court of common pleas of Lucas County, Ohio.

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT.

Before me, a notary public for and within said county, personally came James A. Tenny, who, being duly sworn, says:

That he is the father-in-law of the defendant, A. T. Babbitt; that affiant resides at No. 285 Huron street, in Toledo, Lucas County, Ohio, and has resided at said No. & street for more than five months last past. That said defendant has been for fourteen years last past a resident of the city of Toledo, in Lucas County, Ohio, and for the last five months & over has been residing at said No. 285.

That affiant's daughter is the wife of defendant, and she now is making her home and living at said No. 285, and said defendant is
27 temporarily absent attending to business in Wyoming Territory, said defendant not having removed anything from said city of Toledo, save his own necessary personal wardrobe.

JAS. A. TENNY.

Sworn to before me and subscribed in my presence this 11th day of Nov., 1878.

[SEAL.]

R. R. KINKADE,
Notary Public, Lucas Co., Ohio.

On the 11th day of November, 1878, there was filed in said court an affidavit of Albert T. Babbitt, which affidavit is in the words and figures following, to wit:

Court of common pleas, Lucas Co., Ohio.

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT, DEF'T.

UNITED STATES OF AMERICA,
Territory of Wyoming, County of Laramie, ss:

Personally appeared before me, the undersigned, a notary public in and for said Laramie County, Albert T. Babbitt, who, being by me first duly sworn, says that he is now a citizen and resident of the city of Toledo, county of Lucas, and State of Ohio, and has been such
28 citizen and resident for the period of 14 years last past; that my family now reside at No. 285, on Huron street, in said city; that

my absence from my said residence is only temporary, expecting, as I now do, to return to my said residence during the month of November, A. D. 1878, and further I say not.

ALBERT T. BABBITT.

Sworn to and subscribed before me and in my presence this 6th day of November, A. D. 1878.

[SEAL.]

E. W. MANN,
Notary Public, Laramie Co., Wyoming.

On the 11th day of November, 1878, there was filed in said court an affidavit of Louise T. Babbitt, which affidavit is in the words and figures following, to wit:

Lucas common pleas.

PARKER P. CLARK ET AL.
vs.
A. T. BABBITT.

Before me, a notary public for and within said county of Lucas and State of Ohio, personally came Louisa T. Babbitt, who, being duly sworn, says that she is the wife of the defendant, Albert T. Babbitt; that said Albert T. Babbitt is a resident of Lucas County, Ohio, and his place of residence is at No. 285, Huron street, city of Toledo, in said county and State, and that for fourteen years last past he has
29 been a resident of Lucas County, Ohio. That said affiant is also residing at said No. 285, Huron street, Toledo, Ohio, at which affiant and her said husband have had their residence for more than five months last past.

LOUISE T. BABBITT.

Sworn to before me and subscribed in my presence this 11th day of Nov., 1878.

[SEAL.]

R. R. KINKADE,
Notary Public, Lucas Co., O.

On the 25th day of November, 1878, being the 33 day of the October, term, 1878, of said court, an order in said cause was made, an entry of which appears upon the journal of said court in the words and figures as follows, to wit:

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT. } 18036. No. 232.

This day came the parties by their attorneys' and thereupon this cause came on to be heard on the motion to tax appraisers' fees, and was argued by counsel, and the court being fully advised in the premises do order that said appraisers' fees be fixed at $2.00 per day each.

On the 27th day of November, 1878, there was filed in said court
30 a deposition in said cause, which deposition is in the words and figures following, to wit:

Court of common pleas.

THE STATE OF OHIO,
Lucas County, ss:

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT.

Motion to discharge attachment. Deposition of the and other witnesses will be taken in this action by the plaintiffs at the office of I. N. Wilcoxen, No. 317 Broadway, in the city of New York, county of New York, and State of New York, on the 25th day of November, A. D. 1878, between the hours of 10 o'clock a. m. and 5 o'clock p. m. of said day, and will be continued from day to day, at the same place and between the same hours, until finished.

KENT, NEWTON & PUGSLEY,
Atty. for Plaintiff.

(Indorsed as follows:)

STATE OF OHIO,
Lucas County, ss:

Warren W. Sampsell, being duly sworn, says that on the twenty-first day of November, A. D. 1878, he served upon John C. Lee a copy of this note.

WARREN W. SAMPSELL.

Subscribed and sworn to before me, November 21st, 1878.
[SEAL.]
FRANK E. COLE,
Notary Public, Lucas Co., O.

31 Court of common pleas, Lucas County, State of Ohio.

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT ET AL.

Depositions of witnesses taken in a cause pending in the Lucas County court of common pleas, in the State of Ohio, wherein Parker P. Clark et al. are plaintiffs, and Albert T. Babbitt et al. are defendants, and for said plaintiffs appeared I. N. Wilcoxen, esq.
And for said defendants Charles M. Seymour, esq.

In pursuance of the notice hereto attached, GEORGE B. BURNETT, of the county of New York, of lawful age, being first duly sworn by me, as hereinafter certified, deposes and says:

I know the parties to this suit. I am one of the plaintiffs.

Q. Do you know of the def't, A. T. Babbitt, going to Colorado, and for what purpose; and if so, state.

A. During the month of May, 1878, he said to me that he was going to Colorado in the stock business—to be a ranchman. This conversation took place at the St. Nicholas Hotel, in New York City. He said he had sold out his business in Toledo, Ohio, and wanted to know
32 if I did not want to go in business with his old partner, Mr. Weed. He said $20,000 would be all the capital I would need to put into the concern to make it run easy.

GEO. B. BURNETT.

Also JOHN BULLENE, Jr., of the county of New York, of lawful age, being first duly sworn by me, as hereinafter specified, deposes and says:

My name is John Bullene, jr.; I know Mr. Albert T. Babbitt; I was present on the occasion just testified to by Mr. Burnett. After shaking hands with Mr. Burnett, Mr. Babbitt said to Mr. Burnett, in an off-hand way, I have sold out, and I am going to Colorado to be a ranchman; and he says, Burnett, why would it not be a good thing for you to go into business with my old partner. He said he believe', with his (Burnett's) connection herein, in New York, in business, that he could make money; that wouldn't have to put in more than $20,000 to make it a success. That is about all there was particular about the conversation.

Cross examination by WM. SEYMOUR:

33 Q. Please fix the date of this conversation as near as you can?

A. It was in the latter part of May; that is my impression. I have nothing to fix the date by. It was in the main entrance to the St. Nicholas Hotel, right opposite the office. I was walking with Mr. Babbitt in the hotel. I met him there. He said, hallo, Burnett! and then follow' the conversation I have just related. This conversation lasted about a minute.

J. BULLENE, JR.

Also GEORGE R. BLANCHARD, of the county of New York, of lawful age, being first duly sworn by me, as hereinafter specified, deposes and says:

My name is George R. Blanchard; I know Albert T. Babbitt; I have business arrangements with him; the arrangement is in writing.

Q. Will you produce it?

A. I cannot; it is contract.

Q. Why can't you produce it?

A. It has been mislaid. I have made an effort to find it; I have looked in the places where it should have been found, but have not found it. I am the assistant to the president of the Erie Railway; they have no vice-president. Changes have been made in my house,

34 and this paper has been mislaid on account of such change. This contract was made some time this last spring; I can't recall the date. It was either April or May. The parties to the contract were Mr. Babbitt and myself.

Q. To what did the business mentioned in this contract relate?

(Objected to as incompetent, calling for the contents of a written instrument which should be proved by the instrument itself; taken subject to objection.)

A. Solely to the raising and sale of cattle in some of the Territories. At the time of the contract the Territories had not been decided, but it was subsequently located in Wyoming. Mr. Babbit's post-office address for letters is Davis Ranche, Wyoming Territory. Telegrams were sent to Cheyenne.

Q. State the contents, as near as you can, of the contract you have mentioned.

(Same objection, same reservation.)

A. It is for the purchase, breeding, grazing, and sale of live stock, by which I agreed to put in a certain sum of money. Mr Babbitt agreed to put in a certain other sum, and he agreed to reside there and conduct the business, and a division of the profit, if any, was to be

35 made after an allowance to him for such service, in proportion,

which I cannot now positively recall. The contract was to remain in force, I think, for five years, possibly three.

Q. What was the amount of capital to be employed in the business?

(Objected to as immaterial and irrelevant. Question reserved. Taken subject to objection.

A. About twenty (20) thousand dollars. Mr. Babbitt has gone to Wyoming to carry out the covenants and agreements mentioned in the contract. He went in May or June—May I think.

Q. Has stock been bought under the contract?

(Objected to as immaterial and irrelevant. Taken subject to objection.)

A. Yes, sir.

Cross-examination by Mr. SEYMOUR:

Q. How long has Mr. Babbitt's post-office address been at Davis Ranche?

A. I should say about a month after he arrived there. I mean by post-office address the place where Mr. Babbitt requsted me to send his letters. I sent but one to him there, and that is the place where some of his letters to me have been postmarked. It is about six weeks

36 since I wrote the letter to Mr. Babbitt, perhaps two months.

R. direct:

Q. Will you state what effort you have made to find this contract?

A. I have searched through my library drawers and desks where I usually keep such papers.

Adjourned for the purpose of allowing witness to make a more thorough search for the contract spoken of to November 26th, at 10.15 a. m., at same place.

G. M. BLACHARD.

NOVEMBER 26TH, 1878.

Pursuant to adjournment, Mr. I. N. Wilcoxen appeared for plaintiffs, and Mr. Charles M. Seymour for the defendant.

Mr. GEORGE R. BLANCHARD recalled says:

(Produces contract referred to yesterday.)

Q. Is this the contract of which you testified yesterday?

A. Yes, sir; and under this contract Mr. Babbitt is transacting business in Wyoming; he is now at Toledo. The contract is still in force. I will not allow the original to be attached to this deposition. A copy may be and is attached and marked Exhibit A.

Cross-ex'n:

37 Q. Do you find on perusing this contract that there was any agreement between you and Mr. Babbitt to the effect that he should reside in Wyoming?

(Objected to; the contract speaks for itself.)

A. I find that the contract only requires him to reside at the location selected as much of his time as may be needful to make the said business as successful as practicable.

Q. Were you mistaken in your statement made yesterday upon your direct examination to the effect that Mr. Babbitt had agreed to reside in Wyoming Territory without qualification?

(Objected to for reasons before stated and irrelevant and immaterial;

the question does not state the evidence as given yesterday nor the effect thereof.)

A. I was.

G. R. BLANCHARD.

I, John Brice, jr., notary public, for the county of New York, in the State of New York, do hereby certify that the above-named George B. Burnett, John Bullene, jr., and George R. Blanchard, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the above entitled cause, and that the foregoing depositions, by them respectively subscribed, were reduced to writing by me, and subscribed by the said witnesses in my presence, and were commenced at the time and place in the notice specified, and continued by adjournments from day to day at the same place and between the same hours in the notice specified, and for the reasons above stated.

In testimony whereof I have hereunto set my hand and official seal this 26th day of November, 1878.

[SEAL.]

JNO. BRICE, JR.,
Notary Public, N. Y. Co.

Exhibit A.—J. B., Jr.

Memorandum of understanding and agreement had at New York, this 8th day of July, 1878, by and between A. T. Babbitt, now of Toledo, Ohio, and by G. R. Blanchard, now of the city and county of New York.

First. The parties hereto hereby agree to form and do hereby form a copartnership, which shall begin on this date and continue for the full term of five (5) years from January 1st, 1879, unless sooner discontinued by mutual consent, and shall bind the heirs, administrators, and assigns, of both parties hereto.

Second. The firm shall be known and designated as A. T. Babbitt & Company.

Third. The business is to be only the buying, grazing, raising, and sale of cattle, and shall be conducted on such lands as may be selected by the said Babbitt.

Fourth. Each party hereto agrees to contribute as capital stock ten thousand ($10,000) dollars, and not less. If any additional capital is required the parties hereto may each contribute equally of any increase over twenty thousand dollars ($20,000), which may be mutually agreed is required, and either party failing so to do, the other may advance the extra sum so agreed to be required. No other partner or partners shall become interested herein who are not mutually satisfactory to the parties hereto. In the event that either party hereto contributes capital in excess of the other, the party contributing the excess shall be allowed and paid annually eight per cent (8 %) interest on such excess, otherwise each party hereto is to share and share alike in all expenses, losses, profits, gains, incomes, and outgoes, whatever connected with said business, except as provided in the seventh (7) section hereof.

Fifth. The said Babbitt hereby agrees to proceed to the grazing grounds, make the necessary selection therefor, purchase the necessary animals for the said business, and remain at the location selected so much of his time as may be needful to make the said business as successful as practicable; he (the said Babbitt) further agrees to

keep true and accural records, books and papers of the firm and report results at least monthly to the said Blanchard.

Sixth. The parties hereto both agree that the profits arising prior to the 1st of January, 1884, when this partnership will expire, shall not be withdrawn by either party, but shall be reinvested in stock in such manner as the said Babbitt shall determine, less only the actual and needful expenses which may be incurred under the direction and authority of said Babbitt.

Seventh. At the expiration of this agreement and partnership, there shall first be deducted from the profits, if any, an amount equal to three thousand dollars ($3,000) per annum for the first two years, thirty-five hundred dollars ($3,500) for the third year, and four thousand dollars ($4,000) per annum for the remainder of the term computed from
41 July 15th, 1878, to represent the service of said Babbitt, and the division of profits shall be upon the remainder after the said deduction of expenses and the said salary for the said Babbitt, it being understood that in the event that there are no profits or they are insufficient to pay the said salary, the said Blanchard incurs no responsibility to pay the whole or any part of the salary remaining due, and the amount named as salary is to be paid without interest.

I' witness whereof we have hereunto affixed our hands and seals on the day and date above written.

A. T. BABBITT.
G. B. BLANCHARD.

UNITED STATES OF AMERICA,
State of New York:

The people of the State of New York, by the grace of God full and independent, to all to whom these presents shall come, greeting:

Know ye, that we, having examined the records and files of our court of common pleas for the city and county of New York, do find there remaining of record a certain judgment roll, in the words and figures following, to wit:

42 *Summons for relief.*

Court of common pleas for the city & county of New York.

PARKER P. CLARK, GEORGE H. CLARK, Elijah F. Clark, & George B. Burnett, plaintiffs,
against
ALBERT T. BABBITT AND EDGAR A. WEED, defendants.

To the defendants above named:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the court of common pleas for the city and county of New York, at the county court-house, and to serve a copy of your answer to the said complaint on the subscriber, at his office, number 346 Broadway, N. Y. City, within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

43 Dated July 16th, 1878.

I. N. WILCOXEN,
Plaintiffs' Attorney, 346 Broadway.

Court of common pleas, city and county of New York.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. Clark, and George B. Burnett,
against
ALBERT T. BABBITT AND EDGAR A. WEED.

The plaintiffs above named complaining against the above-named defendants, say:

I. That they were, on the 8th day of Feb'uary, 1877, and still are copartners doing business at the city and county of New York under the firm name and style of Clark Brothers & Co.

II. That the defendants during the time aforesaid were, and still are, copartners, doing business at Toledo, county of Lucas, State of Ohio, as A. T. Babbitt & Co.

III. That between the 8th day of Feb'uary and the 24th day of April, 1877, both days inclusive, they sold and delivered to the defendants, at their request, at the city of New York aforesaid, goods and merchandise of the agreed price and value of twenty-one hundred and three
44 and $\frac{50}{100}$ dollars; that no part thereof has been paid except the sum of nine dollars, leaving a balance unpaid of twenty hundred ninety-four & $\frac{50}{100}$ dollars.

IV. That on or about the 8th day of Feb'uary, 1877, the defendant, Albert T. Babbitt, came to plaintiffs' store to purchase goods on credit. That to induce plaintiff to sell goods on credit to his firm said defendant represented in writing that his firm's assets exceeded their liabilities in the sum of thirty-three thousand six hundred and sixty-four dollars. That relying on these representations, and believing the statements made by said defendant to be true, the plaintiff sold and delivered to the defendant the goods and merchandise before mentioned on a credit of four months.

V. That on or about the 10th day of July, 1877, said Albert T. Babbitt came to plaintiffs' store and claimed that his firm was bankrupt and insolvent. That they were unable to pay over forty per cent. of their indebtedness. That at said time the said defendant to induce plaintiffs to accept forty per cent. of the indebtedness due them, exhibited a written statement of debts and assets of his firm. That this state-
45 ment showed an indebtedness of about twenty thousand dollars existing at the time the first statement was made, which in no way appears in and by said first statement.

VI. Plaintiffs believe that the statement made by Albert T. Babbitt on or about the 5th day of Feb'uary, 1877, showing the condition of his firm, was false, and said Babbitt knew the same to be false; that it was made in order to obtain the goods and merchandise aforesaid on credit, and to cheat, wrong, and defraud the plaintiff. Wherefore the plaintiffs demand judgment against the defendants for the sum of twenty hundred and ninety-four & $\frac{50}{100}$ dollars, with interest from the 24th day of April, 1877, besides costs.

I. N. WILCOXEN,
Pl'ffs' Att'y, 346 Broadway, N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

George H. Clark, being sworn, says that he is one of the plaintiffs in this action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as those matters he believes it to be true.

GEO. H. CLARK.

Sworn to before me this 7th day of August, 1877.
JNO. BRICE, JR.,
Notary Public, N. Y. Co.

Court of common pleas, city & county of New York.

PARKER P. CLARK & OTHERS
ag'st
ALBERT T. BABBITT & ANOTHER.

Albert T. Babbitt, one of the above-named defendants, answer the complaint of the plaintiffs herein, and for answer denies each and every statement and allegation in said complaint contained not hereinafter admitted or otherwise answered.

Second. And for a further and separate answer, defendant alleges that he has no knowledge or information sufficient to form a belief as to whether or not the plaintiffs were or are copartners, doing business under the firm name of Clark Brothers and Company as in the complaint alleged. Defendant admits that on the 8th day of Feb'uary, 1877, and until the commencement of this action the defendants were copartners doing business in the city of Toledo, county of Lucas, in the State
47 of Ohio, under the firm name of A. T. Babbitt & Company.

Defendant admits that between the 8th day of Feb'uary, 1877, and the 24th day of April, 1877, both inclusive, the firm of Clark Brothers & Company sold and delivered to the defendant, as composing the said firm of A. T. Babbitt & Company, at their request at the city of New York, good'and merchandise of the price and value of twenty-one hundred and three $\frac{50}{100}$ ($2,103 $\frac{50}{100}$) dollars, less an allowance of nine ($9.00) dollars, leaving a balance of two thousand and ninety four $\frac{50}{100}$ ($2,094 $\frac{50}{100}$) dollars heretofore due thereupon. And defendant further admits that on or about the 10th day of July, 1877, he represented to the firm of Clark Brothers & Company that the firm of A. T. Babbitt & Company was insolvent and unable to pay its debts in full, and that he did then exhibit a statement of the debts and liabilities of said firm of A. T. Babbitt & Co. showing that the said firm would be unable to pay more than forty cents upon the dollar on its indebtedness, and defendant alleges that the representation so made and the statement so exhibited were true in all particulars.

And defendant further answering, said complaint alleges that
48 the said firm of A. T. Babbitt & Co. became insolvent and unable to pay its debts as they matured prior to the 1st day of July, 1877. That on the 7th day of July, 1877, a petition was duly filed in the district court of the United States for the northern district of Ohio by a number of the creditors of the said firm of A. T. Babbitt and Company, praying for the adjudication of defendants as bankrupts in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and the several acts amendatory thereof. That the said petitioning creditors constituted more than one-fourth in number of all the creditors of the said firm of A. T. Babbitt & Company, whose respective debts exceeded two hundred and fifty dollars and the aggregate of the debts represented by said petitioning creditors, and provable under said act, amounted to more than one-third of all the debts then due and owing by the said A. T. Babbitt & Company. That upon said petition and the proofs accompanying the same, an order to show cause was duly made by the said court, returnable September 15th, 1877,

49 and defendants duly filed an appearance in the said proceedings. That thereafter and on or about the 14th day of July, 1877, defendants made and filed a petition for a meeting of all the creditors of defendants for the purpose of defendants proposing a composition and settlement with their several creditors in accordance with section 17 of the act of Congress, approved June 22d, 1874, entitled "An act to amend and supplement an act, entitled 'An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, and for other purposes'"; and that upon said last named petition an order was duly made calling such a meeting of the creditors of defendants for the 30th day of July, 1877, of which due notice was given to all the creditors of the defendants.

That on said 30th day of July, 1877, a meeting of the creditors of defendants was duly held pursuant to said order in the city of Toledo, before Hon. M. R. Keith, register in bankruptcy, at which meeting defendants were present and produced and submitted a statement of their assets and liabilities duly verified, and that the name and address of the said firm of Clark Brothers & Company and the amount of the
50 debt due to them, as aforesaid, was duly inserted and shown in the said statement. That the defendants then and there proposed a composition to their creditors in full settlement and satisfaction of the debts owing by defendants to their several creditors, as follows, to wit, of forty percentum of their respective claims against defendants in three equal payments, at three, six, and nine months, respectively, from July 15, 1877, to be evidenced by the notes of said A. T. Babbitt & Company, endorsed by T. S. Babbitt, of Dayton, Ohio.

That at said meeting a resolution was adopted accepting the composition offered by defendants as above-mentioned, which resolution was passed by a majority in number, and three-fourths in value, of the creditors of the defendants assembled at such meeting, either in person, or by proxy, and was duly confirmed thereafter by the signatures thereto of the defendants, and more than two-thirds in number and one-half in value of all the creditors of the defendants. That such resolution, together with the statement of the defendants produced at the
51 meeting aforesaid, were thereafter duly presented to the said court, and the said court did, in the manner directed by law, enquire whether such resolution had been passed in the manner directed by law, and did, thereupon, duly confirm the said composition and cause such resolution to be recorded and the statement of assets and liabilities to be filed. Defendant further answering alleges that the defendants have fully complied with the terms and conditions of the said resolution or composition, and the order confirming the same, and have made and deposited with the register in bankruptcy, as in and by said resolution and order provided, promissory notes duly endorsed, as aforesaid, evidencing the promise of defendants to pay the forty per centum of their indebtedness as required by said resolution, in manner, and in the terms as in said proposal of composition, and resolution mentioned, and amongst other notes so made and deposited were three promissory notes signed by defendants in their firm name of A. T. Babbitt & Company, endorsed by T. S. Babbitt, of Dayton, Ohio, and made payable to the order of Clark Brothers & Company, which notes are dated July 13th,
52 1877. all payable three, six, and nine months after said date, respectively, and are for two hundred and seventy-nine dollars and twenty-seven cents each, which said notes taken together amount to forty per centum of the indebtedness of defendants to the said firm of Clark Brothers & Company above mentioned. And defendant further

alleges that the said three notes, last above mentioned, have been, as defendant is informed, verily believes, and alleges, duly tendered to the said firm of Clark Brothers & Company, and ever since have been and are at the order and disposal of the said firm of Clark Brothers & Company at any time And defendant further alleges thas, by reason of the said composition, and the proceedings above mentioned, defendants are, and each of them is, released and forever discharged from the payment of plaintiffs' claim as mentioned in the complaint herein, and every part thereof, in accordance with the provision of the several acts of Congress hereinbefore mentioned, and the acts amendatory thereof.

Wherefore defendant demands judgment against plaintiffs, that the complaint be dismissed, and that he have his costs of this action.

53 CHAS. W. SEYMOUR,
Att'y for Def. A. T. Babbitt, 291 Broadway, N. Y. City.

CITY & COUNTY OF NEW YORK, *ss:*

Charles W. Seymour, being duly sworn, says that he is the attorney for the defendant, Albert T. Babbitt, in the above entitled action, that he resides in the city of Yonkers, county of Westchester, and State of New York; that the above answer is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason why this verification is made by deponent is because the defendant, Albert T. Babbitt, is not within the county where deponent resides, nor within the State of New York; that the grounds of deponent's belief, as to the matters in said answer not stated upon knowledge, are statements made to the deponent by defendant, Albert T. Babbitt, copies of the papers received by deponent from the clerk of the district court for the northern district of Ohio; and representations made to deponent by F. J. Worcester, who made the tender of the notes in the answer mentioned.

CHAS. W. SEYMOUR.

54 Sworn to before me this 2d day of October, 1879.
ALEXIS C. SMITH,
Notary Public, Kings Co., N. Y., & for N. Y. Co.

Court of common pleas for the city & county of New York.

PARKER P. CLARK, GEORGE H. CLARK, EIJAH F. Clark, & George B. Burnett, plaintiffs,
against
ALBERT T. BABBITT & EDGAR E. WEED, defendants.

The issue in this action having been brought on for trial before Mr. Justice Charles P. Daly & a jury at a trial term of this court held on the 10 day of June, 1878, at the county court-house in the city of New York, and the issues having been tried & a verdict for the plaintiff having been duly rendered on the 11 day of June, 1878, & their costs having been duly adjudged at three hundred and sixty-six $\frac{82}{100}$ dollars, now, on motion of I. N. Wilcoxen, for the plaintiffs, it is adjudged that said plaintiffs recover of said defendants twenty-one hundred & sixty dollars, sixty cents, found by the jury, with three hundred sixty-six $\frac{82}{100}$ dollars costs, making together the sum of twenty-six hundred

55 & twenty-six $\frac{82}{100}$ dollars; and that execution issue against the

joint property of the defendant & against the separate property of Albert T. Babbitt, one of the defendants.

N. Y., June 15th, 1878.

NATH. JARVIS, Jr., *Clerk.*

Court of common pleas for the city & county of New York.

At a special term of the court of common pleas for the city & county of New York for the trial of issues of fact held in the county court house of the city of New York on the 10 day of June, 1878.

Present, Hon. Chas. P. Daly, C. judge; I. N. Wilcoxen, plaintiffs' attorney; C. W. Seymour, defendants' attorney.

PARKER P. CLARK & OTHERS *against* ALBERT T. BABBITT & ANO. } Trial by a jury.

This action coming on to be heard this day in its order on the calender, the parties appeared by their respective cause; and a jury being empanelled and sworn, & having heard the proofs therein rendered, a verdict for the plaintiffs against the defendant for the full amount
56 claimed, with interest, being the sum of twenty-two hundred & sixty $\frac{60}{100}$ dollars, allowance 5%, ordered judgment thereupon with costs, staying 20 days after entry of judgment. Extract from minutes.

NATH. JARVIS, Jr., *Clerk.*

All which we have caused by these presents to be exemplified, and the seal of our said court to be hereunto affixed. Witness, Charles P. Daly, chief justice and presiding judge of said court of common pleas for the city and county of New York, at the court-house, in the city of New York, the 27th day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and in the 103d year of the Independence of the United States.

NATH. JARVIS, Jr., *Clerk.*

I, Charles P. Daly, chief justice and presiding judge of the court of common pleas for the city and county of New York, do hereby certify that Nathaniel Jarvis, junior, whose name is subscribed to the preceeding exemplification, is the clerk of the said court of common pleas, duly appointed and sworn, and that full faith and credit are due to his official acts.

57 I further certify that the seal affixed to the said exemplification is the seal of the said court of common pleas, and that the attestation thereof is in due form of law. Dated New York, November 27th, 1878.

CHAS. P. DALY.

STATE OF NEW YORK,
City and County of New York, ss:

I, Nathaniel Jarvis, jr., clerk of the court of common pleas for the city and county of New York, do hereby certify that Charles P. Daly, whose name is subscribed to the preceeding certificate, is a judge and the presiding judge of the court of common pleas for the city and county of New York, duly elected and qualified, and that the signature of said judge to said certificate is genuine. In testimony whereof I have here-

unto set my hand, and affixed the seal of the said court, this 27th day of Nov., 1878.

NATH. JARVIS, JR., *Clerk.*

On the 2nd of December, 1878, there was filed in said court an affidavit of Albert T. Babbitt in the above-entitled cause, which affidavit is in the words and figures following, to wit:

58 Court of common pleas, Lucas County, Ohio.

PARKER P. CLARK & AL., PLAINTIFFS, *vs.* ALBERT T. BABBITT, DEFENDANT. } On the motion to discharge attachment.

STATE OF OHIO,
Lucas County, ss:

The defendant, Albert T. Babbitt, being first duly sworn, deposes and says, that he is acquainted with the witnesses, George B. Burnett and John Bulene, jr., whose depositions have been taken in the motion to discharge the attachment herein, and says that he remembers the occasion at the St. Nicholas Hotel, in the city of New York, referred to by said Burnett & Buline, and says that it is not true that he then stated, or at any other time, stated to them, or either of them, that he had sold out his business in Toledo, nor was such then the fact nor is it so now. And affiant further says that he is yet the owner of the stock in Toledo in said conversation referred to. Affiant further says that it is true that he has associated himself with another in the business of
59 stock breeding and grazing in Wyoming Territory, but not in the State of Colorado, and that to the conduct of that business he has given some attention, and during a portion of the year A. D. 1878 he has been in the Territory of Wyoming, but he has not changed his residence from the city of Toledo, Lucas County, Ohio, nor has he removed his family from said Lucas County, Ohio, nor has he removed his household effects, nor any of them, from said county of Lucas, and during his absence aforesaid he has only had with him such personal apparel as was necessary for his own personal use, and that he now is in the city of Toledo, where he is now a citizen and voter, and that when in said Territory of Wyoming he has been solicited to adopt said Territory as his place of abode, but he has refused to do so, and continues to and does regard said city of Toledo, Lucas County, Ohio, as his place of residence and his domicile.

ALBERT T. BABBITT.

Sworn to before me and subscribed in my presence this 30th day of November, A. D. 1878.

[SEAL.] REYNOLDS R. KINKADE,
Notary Public, Lucas County, Ohio.

60 On the 4th day of December, 1878, being the 40th day of the October term, 1878, an order in said cause was made by said court, an entry of which appears upon its journal, in the words and figures as follows, to wit:

PARKER P. CLARK ET AL. *vs.* ALBERT T. BABBITT ET AL. } 18036. No. 241

This day came the parties, by their attorneys, and thereupon this

cause came on to be heard on the motion to dischar'ed attachment, and was argued by counsel, and the court, being fully advised in the premises, do overrule said motion.

On the 4th of December, 1878, plaintiffs, by their attorneys, filed in said court a præcipe in said cause, which præcipe is in the words and figures as follows, to wit:

Clerk: Issue an alias summons in the above action, returnable according to law. Amount claimed, $1,518\frac{40}{100}$ *dollars*, & interest on same from October 1st, 1878.
Dec. 4th, 1878.

KENT, NEWTON & PUGSLEY,
Pl'ff's Att'ys.

Thereupon summons in said cause was issued by the clerk of
61 said court, which summons is in the words and figures as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:
To the sheriff of Lucas County:

You are commanded to notify Albert T. Babbitt that he has been sued by Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, in the court of common pleas of Lucas County, and that unless he answer by the 4th day of January, A. D. 1879, the petition of the said plaintiffs against him, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 16th day of December, A. D. 1878.
Witness M. J. Enright, clerk of said court, and the seal thereof, at Toledo, this 4th day of December, A. D. 1878.
[SEAL.]

M. J. ENRIGHT, *Clerk.*
By M. V. FISK,
Deputy Clerk.

Which said summons was endorsed as follows, to wit: Summons in action for amount claimed, $1,518\frac{40}{100}$ *dollars*, and interest on same from October 1st, 1878.

KENT, NEWTON & PUGSLEY,
Attorneys for Plaintiffs.

62 On the 7th day of December, 1878, defendant, by his attorney, filed in said court a motion to discharge attachment in said cause, which motion is in the words and figures as follows, to wit:

Motion.

Court of common pleas of Lucas County, Ohio.

PARKER P. CLARK & AL., PLAINTIFFS,
vs.
ALBERT T. BABBITT, DEFENDANT.

And now comes the defendant, Albert T. Babbitt, and brings with him and now presents to the court his bond, in all respects executed in ac-

cordance with the law, and moves the court that the order of attachment heretofore issued in this case may be discharged and that the property taken under said order may be restored to him.

LEE & BROWN,
Def't Att'ys.

On the 7th day of December, 1878, there was filed in said court a notice of motion in said cause, which notice is in words and figures as follows, to wit:

63 *Notice.*

Court of common pleas, Lucas County, Ohio.

PARKER P. CLARK & AL., PLAINTIFFS,
vs.
ALBERT T. BABBITT, DEFENDANT.

The plaintiffs in the above-entitled cause will take notice that at two o'clock p. m. on Friday, Dec. 6th, 1878, the defendant will present to said court his undertaking therefor, and move the court for an order discharging the attachment heretofore granted in said cause.

LEE & BROWN,
Def't Att'ys.

We assent to this order being made, on the filing of the bond with Fred. Eaton, H. S. Walbridge, & S. B. Wood, as sureties.

KENT, NEWTON & PUGSLEY,
Att'ys for Pl'ffs.

On the 7th day of December, 1878, defendants, by their attorneys, filed in said court an undertaking in said cause, which undertaking is in the words and figures as follows, to wit:

Lucas County court of common pleas.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. CLARK, GEORGE B. BURNETT, PLAINTIFFS,
vs.
ALBERT T. BABBITT, DEFENDANT.

64 Whereas an order of attachment has been issued in the above-entitled cause and levied by the sheriff of Lucas County, Ohio, upon the property of the defendant, therefore we, the undersigned, do hereby undertake in the sum of three thousand & seventy-five dollars that the defendant shall perform the judgment of the court therein in all respects.

Witness our hands this 6th day of December, A. D. 1878.

ALBERT T. BABBITT.
FRED'K EATON.
H. S. WALBRIDGE.
S. B. WOOD.

DEC. 7TH, 1878.

This bond is hereby approved as sufficient. Done in open court.

WM. F. LOCKWOOD, *Judge.*

cause came on to be heard on the motion to dischar'ed attachment, and was argued by counsel, and the court, being fully advised in the premises, do overrule said motion.

On the 4th of December, 1878, plaintiffs, by their attorneys, filed in said court a præcipe in said cause, which præcipe is in the words and figures as follows, to wit:

Clerk: Issue an alias summons in the above action, returnable according to law. Amount claimed, $1,518\frac{49}{100}$ *dollars*, & interest on same from October 1st, 1878.

Dec. 4th, 1878.

KENT, NEWTON & PUGSLEY,
Pl'ff's Att'ys.

61 Thereupon summons in said cause was issued by the clerk of said court, which summons is in the words and figures as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:

To the sheriff of Lucas County:

You are commanded to notify Albert T. Babbitt that he has been sued by Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, in the court of common pleas of Lucas County, and that unless he answer by the 4th day of January, A. D. 1879, the petition of the said plaintiffs against him, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 16th day of December, A. D. 1878.

Witness M. J. Enright, clerk of said court, and the seal thereof, at Toledo, this 4th day of December, A. D. 1878.

[SEAL.]

M. J. ENRIGHT, *Clerk.*
By M. V. FISK,
Deputy Clerk.

Which said summons was endorsed as follows, to wit: Summons in action for amount claimed, $1,518\frac{49}{100}$ *dollars*, and interest on same from October 1st, 1878.

KENT, NEWTON & PUGSLEY,
Attorneys for Plaintiffs.

62 On the 7th day of December, 1878, defendant, by his attorney, filed in said court a motion to discharge attachment in said cause, which motion is in the words and figures as follows, to wit:

Motion.

Court of common pleas of Lucas County, Ohio.

PARKER P. CLARK & AL., PLAINTIFFS,
vs.
ALBERT T. BABBITT, DEFENDANT.

And now comes the defendant, Albert T. Babbitt, and brings with him and now presents to the court his bond, in all respects executed in ac-

cordance with the law, and moves the court that the order of attachment heretofore issued in this case may be discharged and that the property taken under said order may be restored to him.

LEE & BROWN,
Def't Att'ys.

On the 7th day of December, 1878, there was filed in said court a notice of motion in said cause, which notice is in words and figures as follows, to wit:

63 *Notice.*

Court of common pleas, Lucas County, Ohio.

PARKER P. CLARK & AL., PLAINTIFFS,
vs.
ALBERT T. BABBITT, DEFENDANT.

The plaintiffs in the above-entitled cause will take notice that at two o'clock p. m. on Friday, Dec. 6th, 1878, the defendant will present to said court his undertaking therefor, and move the court for an order discharging the attachment heretofore granted in said cause.

LEE & BROWN,
Def't Att'ys.

We assent to this order being made, on the filing of the bond with Fred. Eaton, H. S. Walbridge, & S. B. Wood, as sureties.

KENT, NEWTON & PUGSLEY,
Att'ys for Pl'ffs.

On the 7th day of December, 1878, defendants, by their attorneys, filed in said court an undertaking in said cause, which undertaking is in the words and figures as follows, to wit:

Lucas County court of common pleas.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. Clark, George B. Burnett, plaintiffs,
vs.
ALBERT T. BABBITT, DEFENDANT.

64 Whereas an order of attachment has been issued in the above-entitled cause and levied by the sheriff of Lucas County, Ohio, upon the property of the defendant, therefore we, the undersigned, do hereby undertake in the sum of three thousand & seventy-five dollars that the defendant shall perform the judgment of the court therein in all respects.

Witness our hands this 6th day of December, A. D. 1878.

ALBERT T. BABBITT.
FRED'K EATON.
H. S. WALBRIDGE.
S. B. WOOD.

DEC. 7TH, 1878.

This bond is hereby approved as sufficient. Done in open court.

WM. F. LOCKWOOD, *Judge.*

On the 7th day of December, 1878, being the 43rd day of the October term, 1878, of said court, an order in said cause was made, an entry of which appears upon its journal, in the words and figures as follows, to wit:

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT. } 18036. No. 330.

This day came the parties, by their attorneys, and thereupon this cause came on to be heard on the motion to discharge attachment by filing bond, notice having been accepted and discharge assented to by plaintiff, and was argued by counsel, and the court, being fully advised
65 in the premises, do grant said motion.

On the 7th day of December, 1878, said summons was filed in said court with the sheriff's return thereon written, as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:

Received this writ Dec. 4th, 1878, and, pursuant to its command, I summoned on the 4th day of Dec., 1878, the within named defendant Albert T. Babbitt by delivering to him a true & certified copy of the same, with the endorsements hereon.

S. S. LINTON, *Sheriff.*
By L. A. CAMPBELL, *Deputy.*

On the 4th day of January, 1879, the defendant, by his attorney, filed in said court his answer in said cause, which answer is in the words and figures as follows, to wit:

Answer.

Court of common pleas of Lucas County, Ohio.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. CLARK, & GEORGE BURNETT, plaintiffs,
against
ALBERT T. BABBITT, DEFENDANT.

The defendant, Albert T. Babbitt, now comes and, in answer to the petition of plaintiffs, says:

66 That the plaintiffs ought not to have or maintain their action against him, for he says that the said judgment of $2,260$\frac{66}{100}$ was solely for and on account of a balance owing by this defendant to plaintiffs under the firm name of Clark Bros. & Co., as one of the firm of A. T. Babbitt & Co., for merchandise sold & delivered by plaintiffs as such copartners to said firm of A. T. Babbitt & Co. during the year A. D. 1877, & prior to the commencement of the action in which said judgment was recovered, and prior to the commencement of the proceedings in bankruptcy hereinafter referred to, & the same was a claim provable in bankruptcy against said firm of A. T. Babbitt & Co. and this defendant. That the said alleged payment of three hundred eleven & $\frac{82}{100}$ dollars on said judgment was not made by defendant nor by the said firm of A. T. Babbitt & Co., nor by any one by them or him pro-

cured or authorized, but the said sum of $311\frac{22}{100}$ were proceeds of the sale of certain chattels belonging to said firm of A. T. Babbitt & Co., by mesne process seized at the instance of plaintiffs in their said action,
in which said judgment was recovered and afterwards executed
67 by final process on said judgment. That the said alleged payment of eight hundred eighty-seven & $\frac{50}{100}$ dollars in the petition alleged to have been made Oct. 1st, 1878, on said judgment was in fact not made by this defendant, nor by said firm of A. T. Babbitt & Co., nor by any one authorized by them or either of them, nor with the knowledge or consent of them or either of them, but this defendant alleges that the said eight hundred eighty-seven & $\frac{50}{100}$ dollars so alleged to have been received by plaintiffs is the same $887\frac{50}{100}$ hereinafter alleged to have been paid to plaintiffs by J. R. Osborne, register in bankruptcy.

That on the 7th day of July, A. D. 1877, in the district court of the United States for the northern district of Ohio, within which for more than six months then next last past, the said firm of A. T. Babbitt & Co., had been doing business & its members residing, a petition in bankruptcy was filed against said firm of A. T. Babbitt & Co. and its members, under and pursuant to the bankrupt laws of the United States, alleging the insolvency of said firm and all other facts necessary
68 to warrant an adjudication in bankruptcy against it and the several members of said firm, which said petition was so filed by the requisite number and amount of the creditors of said A. T. Babbitt & Co., and the members of said firm were duly served with notice thereof, and subsequently and thereunder, in and by said court, they were duly adjudged bankrupts.

That after such petition in bankruptcy had been so filed and notice thereof had been duly served on the members of said firm of A. T. Babbitt & Co., the members of said firm, in due form of law, filed in said bankrupt court, to wit, July 14th, 1877, in writing, a proposition to the creditors thereof for a composition of all their debts, and prayed that legal notice might be given for a meeting of all creditors to consider and act upon such proposition, and thereupon said bankrupt court ordered that such meeting of creditors be held on the 30th day of July, A. D. 1877, and due and legal notice thereof was given to each and all of such creditors, including the plaintiffs herein.

That on said 30th day of July, A. D. 1877, such meeting was held, in accordance with such order and notice, in said district, before the
69 Hon M. R. Keith, one of the registers in bankruptcy in said district.

That at such meeting the said bankrupts were present and produced to the meeting a statement showing the whole of their assets and debts and the names and address of the creditors to whom such debts were respectively due, and did all and singular in that behalf required of them by law, and the said proposition of said bankrupts to pay to each and all of their creditors the sum of forty cents on the dollar of their indebtedness in cash, in three equal payments, in three, six, and nine months respectively from July 15th, 1877, for which the notes of said A. T. Babbitt & Co., indorsed by T. S. Babbitt, of Dayton, Ohio, were proposed to be given was by resolution in due form agreed to, passed, and adopted by a majority in number, and three-fourths in value of all the creditors present at said meeting, either in person or by proxy, which resolution was thereafter confirmed by the signature of said bankrupts thereto and of more than two-thirds in number and more than one-half in value of all the creditors of said bankrupts. That afterwards said resolution

On the 7th day of December, 1878, being the 43rd day of the October term, 1878, of said court, an order in said cause was made, an entry of which appears upon its journal, in the words and figures as follows, to wit:

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT. } 18036. No. 330.

This day came the parties, by their attorneys, and thereupon this cause came on to be heard on the motion to discharge attachment by filing bond, notice having been accepted and discharge assented to by plaintiff, and was argued by counsel, and the court, being fully advised
65 in the premises, do grant said motion.

On the 7th day of December, 1878, said summons was filed in said court with the sheriff's return thereon written, as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:

Received this writ Dec. 4th, 1878, and, pursuant to its command, I summoned on the 4th day of Dec., 1878, the within named defendant Albert T. Babbitt by delivering to him a true & certified copy of the same, with the endorsements hereon.

S. S. LINTON, *Sheriff.*
By L. A. CAMPBELL, *Deputy.*

On the 4th day of January, 1879, the defendant, by his attorney, filed in said court his answer in said cause, which answer is in the words and figures as follows, to wit:

Answer.

Court of common pleas of Lucas County, Ohio.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. CLARK, & GEORGE BURNETT, plaintiffs,
against
ALBERT T. BABBITT, DEFENDANT.

The defendant, Albert T. Babbitt, now comes and, in answer to the petition of plaintiffs, says:

66 That the plaintiffs ought not to have or maintain their action against him, for he says that the said judgment of $2,260\frac{66}{100}$ was solely for and on account of a balance owing by this defendant to plaintiffs under the firm name of Clark Bros. & Co., as one of the firm of A. T. Babbitt & Co., for merchandise sold & delivered by plaintiffs as such copartners to said firm of A. T. Babbitt & Co. during the year A. D. 1877, & prior to the commencement of the action in which said judgment was recovered, and prior to the commencement of the proceedings in bankruptcy hereinafter referred to, & the same was a claim provable in bankruptcy against said firm of A. T. Babbitt & Co. and this defendant. That the said alleged payment of three hundred eleven $\&\frac{22}{100}$ dollars on said judgment was not made by defendant nor by the said firm of A. T. Babbitt & Co., nor by any one by them or him pro-

cured or authorized, but the said sum of $311\frac{22}{100}$ were proceeds of the sale of certain chattels belonging to said firm of A. T. Babbitt & Co., by mesne process seized at the instance of plaintiffs in their said action,
67 in which said judgment was recovered and afterwards executed by final process on said judgment. That the said alleged payment of eight hundred eighty-seven $\frac{50}{100}$ dollars in the petition alleged to have been made Oct. 1st, 1878, on said judgment was in fact not made by this defendant, nor by said firm of A. T. Babbitt & Co., nor by any one authorized by them or either of them, nor with the knowledge or consent of them or either of them, but this defendant alleges that the said eight hundred eighty-seven $\frac{50}{100}$ dollars so alleged to have been received by plaintiffs is the same $887\frac{50}{100}$ hereinafter alleged to have been paid to plaintiffs by J. R. Osborne, register in bankruptcy.

That on the 7th day of July, A. D. 1877, in the district court of the United States for the northern district of Ohio, within which for more than six months then next last past, the said firm of A. T. Babbitt & Co., had been doing business & its members residing, a petition in bankruptcy was filed against said firm of A. T. Babbitt & Co. and its members, under and pursuant to the bankrupt laws of the United States, alleging the insolvency of said firm and all other facts necessary
68 to warrant an adjudication in bankruptcy against it and the several members of said firm, which said petition was so filed by the requisite number and amount of the creditors of said A. T. Babbitt & Co., and the members of said firm were duly served with notice thereof, and subsequently and thereunder, in and by said court, they were duly adjudged bankrupts.

That after such petition in bankruptcy had been so filed and notice thereof had been duly served on the members of said firm of A. T. Babbitt & Co., the members of said firm, in due form of law, filed in said bankrupt court, to wit, July 14th, 1877, in writing, a proposition to the creditors thereof for a composition of all their debts, and prayed that legal notice might be given for a meeting of all creditors to consider and act upon such proposition, and thereupon said bankrupt court ordered that such meeting of creditors be held on the 30th day of July, A. D. 1877, and due and legal notice thereof was given to each and all of such creditors, including the plaintiffs herein.

That on said 30th day of July, A. D. 1877, such meeting was held, in accordance with such order and notice, in said district, before the
69 Hon M. R. Keith, one of the registers in bankruptcy in said district.

That at such meeting the said bankrupts were present and produced to the meeting a statement showing the whole of their assets and debts and the names and address of the creditors to whom such debts were respectively due, and did all and singular in that behalf required of them by law, and the said proposition of said bankrupts to pay to each and all of their creditors the sum of forty cents on the dollar of their indebtedness in cash, in three equal payments, in three, six, and nine months respectively from July 15th, 1877, for which the notes of said A. T. Babbitt & Co., indorsed by T. S. Babbitt, of Dayton, Ohio, were proposed to be given was by resolution in due form agreed to, passed, and adopted by a majority in number, and three-fourths in value of all the creditors present at said meeting, either in person or by proxy, which resolution was thereafter confirmed by the signature of said bankrupts thereto and of more than two-thirds in number and more than one-half in value of all the creditors of said bankrupts. That afterwards said resolution

On the 7th day of December, 1878, being the 43rd day of the October term, 1878, of said court, an order in said cause was made, an entry of which appears upon its journal, in the words and figures as follows, to wit:

PARKER P. CLARK ET AL.
vs.
ALBERT T. BABBITT. } 18036. No. 330.

This day came the parties, by their attorneys, and thereupon this cause came on to be heard on the motion to discharge attachment by filing bond, notice having been accepted and discharge assented to by plaintiff, and was argued by counsel, and the court, being fully advised
65 in the premises, do grant said motion.

On the 7th day of December, 1878, said summons was filed in said court with the sheriff's return thereon written, as follows, to wit:

THE STATE OF OHIO,
Lucas County, ss:

Received this writ Dec. 4th, 1878, and, pursuant to its command, I summoned on the 4th day of Dec., 1878, the within named defendant Albert T. Babbitt by delivering to him a true & certified copy of the same, with the endorsements hereon.

S. S. LINTON, *Sheriff.*
By L. A. CAMPBELL, *Deputy.*

On the 4th day of January, 1879, the defendant, by his attorney, filed in said court his answer in said cause, which answer is in the words and figures as follows, to wit:

Answer.

Court of common pleas of Lucas County, Ohio.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. CLARK, & GEORGE BURNETT, plaintiffs,
against
ALBERT T. BABBITT, DEFENDANT.

The defendant, Albert T. Babbitt, now comes and, in answer to the petition of plaintiffs, says:

66 That the plaintiffs ought not to have or maintain their action against him, for he says that the said judgment of $2,260\frac{66}{100}$ was solely for and on account of a balance owing by this defendant to plaintiffs under the firm name of Clark Bros. & Co., as one of the firm of A. T. Babbitt & Co., for merchandise sold & delivered by plaintiffs as such copartners to said firm of A. T. Babbitt & Co. during the year A. D. 1877, & prior to the commencement of the action in which said judgment was recovered, and prior to the commencement of the proceedings in bankruptcy hereinafter referred to, & the same was a claim provable in bankruptcy against said firm of A. T. Babbitt & Co. and this defendant. That the said alleged payment of three hundred eleven $\&\frac{22}{100}$ dollars on said judgment was not made by defendant nor by the said firm of A. T. Babbitt & Co., nor by any one by them or him pro-

cured or authorized, but the said sum of $311\frac{92}{100}$ were proceeds of the sale of certain chattels belonging to said firm of A. T. Babbitt & Co., by mesne process seized at the instance of plaintiffs in their said action, in which said judgment was recovered and afterwards executed
67 by final process on said judgment. That the said alleged payment of eight hundred eighty-seven & $\frac{50}{100}$ dollars in the petition alleged to have been made Oct. 1st, 1878, on said judgment was in fact not made by this defendant, nor by said firm of A. T. Babbitt & Co., nor by any one authorized by them or either of them, nor with the knowledge or consent of them or either of them, but this defendant alleges that the said eight hundred eighty-seven & $\frac{50}{100}$ dollars so alleged to have been received by plaintiffs is the same $887\frac{50}{100}$ hereinafter alleged to have been paid to plaintiffs by J. R. Osborne, register in bankruptcy.

That on the 7th day of July, A. D. 1877, in the district court of the United States for the northern district of Ohio, within which for more than six months then next last past, the said firm of A. T. Babbitt & Co., had been doing business & its members residing, a petition in bankruptcy was filed against said firm of A. T. Babbitt & Co. and its members, under and pursuant to the bankrupt laws of the United States, alleging the insolvency of said firm and all other facts necessary
68 to warrant an adjudication in bankruptcy against it and the several members of said firm, which said petition was so filed by the requisite number and amount of the creditors of said A. T. Babbitt & Co., and the members of said firm were duly served with notice thereof, and subsequently and thereunder, in and by said court, they were duly adjudged bankrupts.

That after such petition in bankruptcy had been so filed and notice thereof had been duly served on the members of said firm of A. T. Babbitt & Co., the members of said firm, in due form of law, filed in said bankrupt court, to wit, July 14th, 1877, in writing, a proposition to the creditors thereof for a composition of all their debts, and prayed that legal notice might be given for a meeting of all creditors to consider and act upon such proposition, and thereupon said bankrupt court ordered that such meeting of creditors be held on the 30th day of July, A. D. 1877, and due and legal notice thereof was given to each and all of such creditors, including the plaintiffs herein.

That on said 30th day of July, A. D. 1877, such meeting was held, in accordance with such order and notice, in said district, before the
69 Hon M. R. Keith, one of the registers in bankruptcy in said district.

That at such meeting the said bankrupts were present and produced to the meeting a statement showing the whole of their assets and debts and the names and address of the creditors to whom such debts were respectively due, and did all and singular in that behalf required of them by law, and the said proposition of said bankrupts to pay to each and all of their creditors the sum of forty cents on the dollar of their indebtedness in cash, in three equal payments, in three, six, and nine months respectively from July 15th, 1877, for which the notes of said A. T. Babbitt & Co., indorsed by T. S. Babbitt, of Dayton, Ohio, were proposed to be given was by resolution in due form agreed to, passed, and adopted by a majority in number, and three-fourths in value of all the creditors present at said meeting, either in person or by proxy, which resolution was thereafter confirmed by the signature of said bankrupts thereto and of more than two-thirds in number and more than one-half in value of all the creditors of said bankrupts. That afterwards said resolution

70 together with the statement of said bankrupts produced at such meeting was duly presented to said bankrupt court, and the said court, upon notice to all the creditors of said bankrupts, including the plaintiffs, of not less than five days, upon hearing did inquire whether said resolution had been passed in the manner directed by sec. 5103 A, of the Revised Statutes of the United States, approved 22d June, A. D. 1874 (and found in sec. 17, chapter 390, 18th volume of the U. S. Statutes, on page 182 et seq.), and being satisfied, upon such hearing and inquiry, that said resolution had been passed, subject to, in accordance with, and pursuant to all the provisions of law, and being satisfied also that the same was for the benefit of all concerned, ordered and caused said resolution to be recorded, and said statement of assets and debts to be filed, and the said resolution was then and there recorded, and said statement then and there filed, all as required by law, in which statement are the names, addresses, and the amount of the said debt in favor of plaintiffs; that thereupon said bankrupt court made an

71 order referring said matter to the Hon. John R. Osborne, one of the registers in bankruptcy, in said northern district of Ohio, to supervise and to cause said composition to be executed; that thereupon the said bankrupts forthwith executed and caused to be executed the promissory note of said firm, indorsed by said T. S. Babbitt. of Dayton, Ohio, for the full amount of the forty per cent. to each of the creditors of said firm, including therein the plaintiffs herein, to wit, one note at three months, one at six months, and one at nine months from July 15th, 1877, and each for one-third of the said sum of forty per cent. and deposited the same with said register, in execution of all which the plaintiffs and all other creditors of said firm had due and legal notice.

That afterwards, as each of said notes became due, the same were, in three, six and nine months respectively, from said 15th day of July, A. D. 1877, paid in full by said bankrupts to the said register, Osborne, and the moneys so paid by said bankrupts were received by said register, Osborne, upon and in execution of said composition, and

72 the creditors aforesaid were by said register forthwith notified by said register that said moneys were so paid to and were by him held ready to be paid over to said creditors, in execution of said composition.

That afterwards, and on or about the eleventh day of September, A. D. 1878, and long after the time of the recovery of the judgment against this defendant by the plaintiffs in the petition mentioned, the said John R. Osborne, register, paid the said plaintiffs the full amount of the said moneys so paid to him by said bankrupts, in fulfillment and execution of said composition, and the said moneys, to wit, the sum of eight hundred thirty-seven $\frac{50}{100}$ dollars were then and there received by said plaintiffs of said register with full knowledge that the said register had received and then held the same, as and for the moneys of said bankrupts, by them paid into his hands wholly for the purpose of fulfilling said composition, on the part of said bankrupt in respect to the said claim of plaintiffs, then in the form of the judgment in the plaintiffs' petition set forth, and with full knowledge by plaintiffs, as was the fact, that said register had no power or authority to give, deliver, or

73 pay said moneys or any part thereof to plaintiffs, save in the full and complete execution of the said composition in respect to plaintiffs and their said claim against said firm of A. T. Babbitt & Co. and this defendant. That plaintiffs, when they so received the said sum of $\$837\frac{50}{100}$ as aforesaid, received the same as the sum to be paid them by said bankrupts in pursuance of said resolution in the composition

proceedings hereinbefore mentioned and in satisfaction of their said claim against said bankrupts and of the judgment against this defendant set forth in said petition.

That by reason of the premises this defendant alleges that the plaintiffs cannot maintain their said action on said judgment against defendant; that the same in fact is and ought to be on the records satisfied and cancelled and that the plaintiffs are estopped from making any other or further claim against defendant on account of said judgment, or on account of the cause or causes of action upon which the same was recovered, and that there is nothing due or owing from the defendant to plaintiffs in the premises.

Whereupon the defendant prays that plaintiffs may be barred of
74 *of* their said action; that said judgment may be found and declared to be satisfied, and for other and full relief.

LEE & BROWN,
Att'ys for Def't.

STATE OF OHIO,
Lucas Co, ss:

The defendant, A. T. Babbitt, being duly sworn, says that he believes the facts contained in the foregoing answer are true.

ALBERT T. BABBITT.

Sworn to before me and subscribed in my presence this 30th day of December, A. D. 1878.

[SEAL.] REYNOLDS R. KINKADE.
Notary Public, Lucas County, Ohio.

On the 3rd day of April, 1879, plaintiffs, by their attorneys, filed in said court their reply in said cause, which reply is in the words and figures as follows, to wit:

Reply.

Lucas County court of common pleas.

PARKER P. CLARK & OTHERS, PLAINTIFFS,
against
ALBERT T. BABBITT, DEFENDANT.

Parker P. Clark and others, plaintiffs, for a reply to the answer of defendant herein filed, say that the action in which the judgment
75 was obtained in the court of common pleas in & for the city & county of New York, in the State of New York, described in the petition by them filed in this action, was commenced in said court on the 16th of July, A. D. 1877, and was brought to recover the amount due plaintiffs on an account for goods sold & delivered by them to the defendant, Albert T. Babbitt & one Edgar A. Weed, as partners under the name of A. T. Babbitt & Co.; that plaintiffs, in their petition filed to recover on said account in said court, alleged, in substance, among other things, that the claim upon said account originated in the fraud of the defendant, Babbitt, in this, to wit, that said Babbitt, at and before the sale & purchase of said goods, & for the purpose of inducing the plaintiffs to sell & deliver said goods to said firm of A. T. Babbitt & Co. on a credit, represented that the assets of said firm exceeded its

liabilities by more than thirty thousand dollars; that, relying upon said representations, plaintiffs sold & delivered said goods to said firm on a credit, and that said representations were false and fraudulent, and by said Babbitt made to cheat & defraud the plaintiffs; that after-
76 wards, and on the 2d day of October, A. D. 1877, said Babbitt filed his answer in said action so commenced in said court, &, among other things, denied the allegations of fraud as aforesaid in purchasing and obtaining the said goods on a credit.

And said Babbitt further answered in said action, and, among other things, alleged, in substance, as follows, to wit: That on the 7th day of July, A. D. 1877, a number of the creditors of said firm of A. T. Babbitt & Co. duly filed their petition in the district court of the United States in & for the northern district of Ohio, wherein said firm, then & for more than six months prior thereto, had resided, the object of which proceeding was to obtain a decree of said court adjudging the said Babbitt & Weed to be bankrupts under the act of Congress of the United States to establish a uniform system of bankruptcy throughout the United States, approved March 2nd, A. D. 1867, & the several acts amendatory thereof & supplementary thereto.

That said petitioning creditors constituted the requisite number thereof as provided in said act, in which proceeding said Babbitt duly appeared, and that on about the 14th day of July, A. D. 1877, the
77 defendants in said proceeding filed their petition therein for a meeting of all their creditors for the purpose of acting upon a proposition for a compromise & settlement with their said creditors in accordance with said act & an act amendatory & supplementary to said act; that afterwards, at a meeting of said creditors duly held for that purpose, a resolution was duly passed by said creditors to accept the sum of forty per centum of their debts respectively in the notes of said firm, endorsed by one T. S. Babbitt, payable in equal amounts in three, six, and nine months, respectively, from said 15th day of July, A. D 1877.

That such proceedings were thereafter had that said resolution was duly approved by said court, and thereupon said firm, in due form, made and delivered said endorsed notes for said creditors of said firm, & including notes for plaintiffs, to the register in bankruptcy, as required by said resolution, & in all respects complied with said resolution and proposal of composition as aforesaid, and that afterwards said notes, so made & endorsed for plaintiffs, were duly tendered to them, of
78 all which proceedings said plaintiffs, from time to time, had due and legal notice; and thereupon said Babbitt, in his said answer, claimed that by either of said proceedings he was released and forever discharged from the payment of plaintiffs' said claim, and asked a judgment that plaintiffs' action therefor be dismissed.

Plaintiffs say that, under the statute of said State of New York, gover'ing the conduct of legal proceedings, and the practice of said court of common pleas, all the allegations of said Babbitt, in his said answer as aforesaid, were in fact & in law denied, the same as if by a formal reply thereto the same had been denied by plaintiffs, so that not only the alleged fraud of Babbitt in procuring the sale & delivery of said goods as aforesaid, but also the effect of said bankruptcy proceedings & the composition thereunder were put in issue by the pleadings of the parties to said action respectively so instituted and carried on in said court.

Farther answering, plaintiffs say that said action so commenced in said court of common pleas continued pending and undetermined

therein until long after all of said composition notes became due
79 and payable, and until the 15th day of June, A. D. 1878, at which time, at a special term of said court, the issues raised as aforesaid in said action, with proofs in support of same, were duly submitted to said court and a jury, and thereupon said jury passed upon all of said issues of fact, and rendered a verdict in favor of the plaintiffs, and upon which verdict said court afterwards, & on the 15th day of June, A. D. 1878, rendered a judgment as stated in the petition herein filed, and plaintiffs say that said Babbitt at no time applied to said court to amend his said answer, or to file a new answer so as to set up therein the payment of said composition notes, and the full performance by him of all things required in order to comply with the terms of said composition & to obtain his discharge in bankruptcy under said proceedings, nor did he at any time during the pendency of said action in said court move said court for any continuance of the same while said bankruptcy proceedings were so pending, nor upon the rendition of the verdict did he move to set the same aside, or the
80 judgment following the same, or except to the same, or in any manner object thereto, a certified copy of which proceedings and a transcript thereof is now here ready to be produced, & to which plaintiffs on the trial hereof will refer.

Plaintiffs further say that the sum of eight hundred thirty-seven & $\frac{50}{100}$ dollars, paid to them by John R. Osborne, said register in bankruptcy was received by said Osborne, and so paid to him for the plaintiffs, and that when he so paid the same to plaintiffs, he held the same to the use of & in trust for the plaintiffs. And plaintiffs say that it is not true, & they deny that they received said money, or that the same was paid to them in pursuance of said resolution in said composition proceedings and in satisfaction of plaintiffs' claim, and they say that they received the said money, as they lawfully might, to apply upon said judgment & toward the payment thereof, but not in satisfaction of the same, and plaintiffs deny each & every allegation of said answer inconsistent with the foregoing.

KENT, NEWTON & PUGSLEY,
P'lff's Att'ys.

81 STATE OF OHIO,
Lucas County, ss:

John S. Newton, being duly sworn, says that he is an attorney of the plaintiffs in this action; that all of said plaintiffs are non-residents & absent from the State of Ohio, & that he believes the statements contained in the foregoing reply are true.

JOHN S. NEWTON.

Sworn to before me & signed in my presence this 2nd day of April, A. D. 1879.

[SEAL.]

FRANK E. COLE,
Notary Public, Lucas Co., Ohio.

On the 3rd day of May, 1879, plaintiffs, by their attorneys, filed in said court their amendment to said reply in said cause, which said amendment is in the words and figures as follows, to wit:

Amendment to reply.

Lucas common pleas.

PARKER P. CLARK & OTHERS, PLAINTIFFS,
against
ALBERT T. BABBITT, DEFENDANT.

By way of amendment to the reply heretofore filed by plaintiffs in this action, plaintiffs say that, subsequent to the rendition of judgment obtained by them against the defendant herein, and which is de-
82 scribed in the petition in the action, that is to say, on the 5th day of July, A. D. 1878, the defendant, upon his motion duly made in the court wherein said judgment was rendered and then & there having jurisdiction to hear & dispose of such motion, to wit, in the court of common pleas, in & for the city, county, & State of New York, obtained an order in due form of law upon the plaintiffs to show cause at a special term of said court, at chambers in said city, on the 15th day of July, A. D. 1878, or as soon thereafter as counsel could be heard, why plaintiffs should not be perpetually enjoined from all further proceedings upon said judgment, and why defendant should not have such other & further order in the premises as to the court should seem meet; that upon the hearing of said motion, to wit, on the 24th day of August, A. D. 1878, there was, among other things, introduced in evidence before said court a transcript, duly certified, of the said proceedings in bankruptcy and of the composition thereunder, as set forth in the answer of defendant in this action, and in addition thereto evidence showing that the composition notes executed & delivered by defendant to the register in bankruptcy for plaintiffs, in pursuance of the resolution
83 for said composition, as stated in said answer and in said original reply, had before that time, to wit, on the 21st day of June, A. D. 1878, been fully paid to said register, and that the moneys paid on said notes were then in the hands of said register ready to be paid to plaintiffs.

And plaintiffs further say that, upon the hearing of said motion, it was in evidence before the said court that upon the trial of the action in which said judgment was rendered, defendant, although having seasonable opportunity so to do, did not offer in evidence to sustain the allegations of his answer filed therein the record of said proceedings in bankruptcy, and further, that said court upon said trial instructed the jury empanneled to try the issues of fact therein as stated in said original reply, they should find a verdict for defendants in said action unless plaintiffs had proved upon the trial that their debt was fraudulently contracted; and thereupon, after hearing the evidence aforesaid, & upon consideration thereof, the said court overruled the said motion and ordered that said order to show cause, as aforesaid, be vacated
84 & set aside, & the said motion for a perpetual injunction be denied, and which said order and judgment remains of record in said court unreversed & in full force. Plaintiffs say that the records, files, & all papers were, on the hearing of said motion and the proceedings thereunder duly attested and exemplified, will on the trial of this action be produced, & to which plaintiffs will ask leave to refer.

KENT, NEWTON & PUGSLEY,
Pltf's Att'ys.

STATE OF OHIO,
Lucas County, ss:

John T. Newton, being duly sworn, says that he is an attorney of plaintiffs in the action aforesaid; that all of said plaintiffs are non-residents of and absent from the State of Ohio, & that he believes the statements contained in the foregoing answer and reply to be true.

JOHN T. NEWTON.

Sworn to before me & signed in my presence this 3rd day of May, A. D. 1879.

[SEAL.] J. T. MOORE,
Notary Public.

On the 17th day of May, 1879, defendant, by his attorney, filed in said court his petition for the removal of said cause to the circuit
85 court of the United States, which petition is in words and figures as follows, to wit:

Petition for removal to the circuit court of the United States for the western division of the northern district of Ohio.

In the court of common pleas of Lucas County, Ohio.

PARKER P. CLARK & AL., PLAINTIFFS,
against
ALBERT T. BABBITT, DEFENDANT. } No. 18036.

Albert T. Babbitt, your petitioner, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner at the time of the commencement of this suit was carrying on business and was in the Territory of Wyoming, and the plaintiffs, at the time of the commencement of this action, filed in said cause an affidavit, in which it was alleged that your
86 petitioner was then not a resident of the State of Ohio, and upon said affidavit proceeded the issuing in said cause, upon the ground that your petitioner was then not a resident of the State of Ohio, of an order of attachment against your petitioner and his property, which order of attachment was levied on property of petitioner in Lucas County and State of Ohio.

That thereupon petitioner moved said court in due form to discharge said attachment, for the reason that petitioner was not a non-resident of the State of Ohio, which motion, being resisted by the plaintiffs, was heard upon evidence adduced to the court by both the plaintiffs and your petitioner, and the court, upon such hearing, held that petitioner was not a resident of the State of Ohio, and was domiciled out of said State, to wit, in the Territory of Wyoming, and said motion was overruled. That this petitioner is now domiciled in, and is a citizen of, the Territory of Wyoming, and that each and all of the plaintiffs, at the time of the commencement of this action, were and yet are non-residents and not citizens of the State of Ohio, and are citizens of
87 the State of New York.

Your petitioner further states that the defence of petitioner in said cause, which was made by answer filed in due time, is one arising under the Constitution and laws of the United States, in that petitioner

in his answer to the claim of the plaintiffs alleged, as was and is the fact, that he was duly adjudged as a member of the firm of A. T. Babbitt & Co., a bankrupt, under the bankrupt laws of the United States, in the district court of the United States for the northern district of Ohio, and under and pursuant to the bankrupt laws of the United States, in the month of July, A. D. 1877, and that under and pursuant to said laws said firm of A. T. Babbitt & Co. effected and executed a compromise with their creditors, including therein the plaintiffs and their said claim on which said judgment was founded, which was a claim for goods sold and delivered to said firm of A. T. Babbitt & Co., and that by reason of said compromise proceedings their said claim is invalid and barred. That to each defence of this defendant in said cause the plaintiffs have made reply therein, to wit, April 3, 1879, out of rule; without leave of court or notice to defendant thereof until after
88 the close of the term of said court then pending, to wit, until May 3d, 1879, when an amended reply was filed therein, whereby they call in question and deny the legal validity and sufficiency of said proceedings in bankruptcy, and of the compromise therein and thereunder and of the said bankrupt laws of the United States.

That this May term, 1879, is the first term of this court at which this cause could be tried, or is or was triable, and the same has not been tried nor has the trial thereof been begun. And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And he prays this honorable court to proceed no further herein, excepting to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of
89 the United States in and for the western division of the northern district of Ohio, and he will ever pray.

LEE & BROWN,
Att'ys for Petitioner Albert T. Babbitt.

STATE OF OHIO,
Lucas County, ss:

I, John C. Lee, being duly sworn, do say that I am a member of the firm of Lee & Brown, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true as I verily believe.

JOHN C. LEE.

Sworn to before me and subscrib d in my presence this 5th day of May, A. D. 1879.

[SEAL.]

FRANK A. LEE,
Notary Public, Lucas Co, Ohio.

On the 17th day of May, 1879, defendant, by his attorney, filed in said court his undertaking in said cause, which undertaking is in the words and figures as follows, to wit:

Know all men by these present', That I, Albert T. Babbitt, as prin-
cip*le*, and Cyrus H. Coy, of Toledo, Ohio, as surety, are held and
90 firmly bound unto Parker P. Clark, George H. Clark, Elijah F. Clark, and George Burnett, in the penal sum of two hundred

dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, jointly & severally, firmly by these presents.

The condition of this obligation is such that if Albert T. Babbitt shall enter and file, or cause to be entered and filed, in the next circuit court of the United States in & for the western division of the northern district of Ohio, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings, in a certain suit now pending in the court of common pleas of Lucas County, Ohio, in which the said Parker P. Clark, George H. Clark, Elijah F. Clark and George Burnett are plaintiffs and the aforesaid Albert T. Babbitt is defendant, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void, otherwise of force.

Dated Toledo, May 17th, 1879.

ALBERT T. BABBITT.
C. H. COY.

91 On the 28th day of May, 1879, being the 23rd day of the April term, 1879, of said court, an order was made in said cause, an entry of which appears upon the journal of said court in the words and figures as follows, to wit:

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. Clark, and George B. Burnett
vs.
ALBERT T. BABBITT.
} No. 18036.

This day came the parties hereto, and thereupon came on, and was heard the petition for removal of this cause to the circuit court of the United States for the western division of the northern dist. of Ohio, filed herein on the 17th day of May, A. D. 1879, and thereupon the court having heard the said petition, and the proofs adduced by the parties, find that the petition in this cause was filed herein on the 25th day of October, A. D. 1878, and that the answer of the defendant thereto was filed in due time, to wit, January 4th, 1879, and that the reply thereto was filed April 3d, A. D. 1879, and without leave of court therefor, and without notice to the defendant, and that an amended reply was
92 by the plaintiff filed on the third day of May, A. D. 1879, which said reply was also filed without leave of court, and without notice to or knowledge by the defendant, of the filing of either of said original or amended reply until May 3d, A. D. 1879.

And the court further finds that the terms of said court of common pleas began and ended as follows, to wit: The October term thereof, A. D. 1878, adjourned sine die January 2d, 1879. The Jan'y term, A. D. 1879, of said court, began Jan'y 2d, A. D. 1879, and adjourned sine die on the seventh day of April, A. D. 1879, and that the next term of said court began on the 28th day of April, A. D. 1879, which term is yet pending.

And the court finds and certifies that the said court of common pleas at its said term of court which adjourned sine die April 7th, A. D. 1879, had ceased to hear or try causes at said term two weeks prior to said seventh day of April, A. D. 1879, and that after the filing of said reply, April 3d, 1879, said cause of Parker P. Clark & others vs. A. T. Babbitt could not have been tried at said term; and the court further finds

93 that said cause at no time heretofore has been reached for trial in the regular order for the trial of causes, and the trial of the same has not been begun.

And the court also further finds that the said bond now tendered & filed herein, for the removal of said cause, is in due form, and the surety thereon is satisfactory to the court, and is approved.

And the court being in other respects satisfied that the said petition for removal should be granted, hereby orders that said petitions be granted, and said cause be removed to said circuit court of the United States for the western division of the northern district of Ohio, and that all further proceedings in said cause in this court be stayed.

94 *Certificate to common pleas record.*

THE STATE OF OHIO,
Lucas County, ss:

I, M. J. Enright, clerk of the court of common pleas, within and for said county, and in whose custody the files, pleadings, journals, execution docket, and seal of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the records of the proceedings of the court of common pleas within and for said county, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript therefrom, and that the foregoing transcript contains full and true copies of all pleadings, proceedings, process, with returns and proceedings therein and affidavits and depositions in said cause.

In testimony whereof I do hereunto subscribe my name officially, and affix the seal of said court, at the court-house in Toledo, in said county, this second day of June, A. D. 1879.

[SEAL.] M. J. ENRIGHT, *Clerk*,
By M. V. FISK,
Deputy Clerk.

$10.60.
Rec'd above $10.60.
M. J. ENRIGHT, *Clk*,
By E. H.

95 And afterwards, to wit, on the 24th day of June, 1879, there was filed in said court the following motion:

Motion to remand case.

U. S. circuit court northern district of Ohio, western division.

PARKER P. CLARK, GEORGE H. CLARK, ELIJAH F. Clark, George B. Burnett, plaintiffs,
v.
ALBERT T. BABBITT, DEFENDANT.

The plaintiffs move the court for an order to remand this suit to the court of common pleas of Lucas county, Ohio, for the following reasons:

1. That the controversy in said suit is not between citizens of different States.

2. That the said suit does not arise, nor any controversy therein, under the Constitution or laws of the United States.

3. That the said suit does not involve a dispute or controversy properly within the jurisdiction of this court.

4. That said suit is not removable from said State court to this court under the laws of the United States.

5. That the petition for the removal of said suit to this court was not filed in said State court before or at the term of said State court at which said suit could have been first tried.

96 6th. That the bond filed in said State court at the time of filing said petition for removal is defective, in that it does not provide, as required by law, for paying all costs that may be awarded by this court, if the said court shall hold that the said suit was wrongfully or improperly removed thereto.

KENT, NEWTON & PUGSLEY,
Pl'ffs' Att'ys.

And afterward, to wit, on the 17th day of September, A. D. 1879, there was filed in said court the following transcript from the court of common pleas of Lucas county, to wit:

Additional bond.

PARKER P. CLARK, ET AL.
vs. 18036.
ALBERT T. BABBITT.

Know all men by these presents that I, Albert T. Babbitt, as principal, and Cyrus H. Coy, as surety, are held and firmly bound unto Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, in the penal sum of two hundred dollars to the payment whereof well and truly to be made unto the said Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, their heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions:

97 Whereas the said Albert T. Babbitt having petitioned the court of common pleas of Lucas county and State of Ohio, at its April term, A. D. 1879, for the removal of a certain cause therein pending, wherein the said Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett are plaintiffs and the said Albert T. Babbitt is defendant, to the circuit court of the United States, in and for the western division of the northern district of Ohio; and whereas with said petition said Babbitt filed his certain bond, and the same was executed by the said Albert T. Babbitt as principal, and said Cyrus W. Coy as his surety, and in the said penal sum of two hundred dollars, and whereas, for the purpose of such removal, the said bond was approved by said court of common pleas, and said cause on the 5th day of June, 1879, was removed to the said circuit court of the United States; and whereas said Babbitt desires to file an additional bond in said cause and in the matter of the removal thereof:

Now, therefore, we, the said Albert T. Babbitt, as principal, and the said Cyrus H. Coy, as his surety, do hereby undertake and promise in any sum not exceeding two hundred dollars, to well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

98 Witness our hands and seals this twenty-fifth day of August, A. D. 1879.

ALBERT T. BABBITT.
CYRUS H. COY.

Bond and surety approved Sep't 1, 1879.

M. J. ENRIGHT, *Clk*,
By E. HAMILTON, *Deputy*.

THE STATE OF OHIO,
Lucas County, ss:

I, Cyrus H. Coy, of said county, the surety named in the foregoing bond, do depose and say that I am a resident of the State of Ohio, and a property-holder therein; that I am worth the sum of five hundred dollars, over and above all my debts and liabilities, and exclusive of property exempt from execution; that I have property in the State of Ohio liable to execution of the value of more than five hundred dollars.

CYRUS H. COY.

Subscribed in my presence by Cyrus H. Coy, and by him sworn to before me this 1st day of Sept., 1879.

[SEAL.] REYNOLDS KINKADE,
Notary Public in and for Lucas Co., O.

99 THE STATE OF OHIO,
Lucas County, ss:

I, M. J. Enright, clerk of the court of common pleas within & for Lucas County, do hereby certify that the foregoing is a true copy of an additional bond, together with a justification of Cyrus H. Coy as surety thereon, filed in said court on the 1st day of September, A. D. 1879, in the above-entitled cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, this 15th day of September, A. D. 1879.

[SEAL.] M. J. ENRIGHT, *Clerk*,
By M. V. FISK, *Deputy Clerk*.

And afterwards, to wit, on the 18th day of September, A. D. 1879, being a day of the June term of said court, the following proceedings were had, to wit:

PARKER P. CLARK ET AL. } Law.
v.
A. T. BABBITT. }

This cause came on this day for hearing upon the motion of plaintiffs to remand the cause back to the court of common pleas of Lucas County, Ohio, and was argued by counsel and taken under advisement by the court.

And afterwards, to wit, on the 20th day of December, A. D.
100 1879, being a day of the December term of said court, the following proceedings were had, to wit:

PARKER P. CLARK ET AL. } Law.
v.
ALBERT T. BABBITT. }

This day came on and was heard the motion of the plaintiffs to remand

said cause to the court of common pleas of Lucas County, Ohio, from which the same had been removed, upon which motion the court heard the proofs and arguments of counsel, and upon full consideration whereof, the court find:

First. That plaintiffs filed their petition in said cause in the court of common pleas of Lucas County, Ohio, October 25th, 1878, and that defendant filed his answer within rule therefor, to wit, on the fourth day of January, 1879, to which answer reply should have been filed by the laws of Ohio on or before the 18th day of January, 1879.

Second. That no reply was put on file until the 3d day of April, 1879, when the same was so filed. It was without any leave of court therefor, and without any notice to or knowledge of such filing until the 3d day of May, 1879, by the defendant or his attorneys, and an amended reply was filed without either leave of court or notice to defendant or his counsel, May 3d, 1879, and neither defendant had notice of until May 3d, 1879.

101 Third. That the terms of said court, by the records thereof appear to have begun and adjourned as follows, to wit: The October term adjourned sine die on the 2d day of January, A. D. 1879; the January term thereof began on the 2d day of January, A. D. 1879, and adjourned sine die on the 7th day of April, A. D. 1879; and the next term of said court began on the 28th day of April, A. D. 1879, and did not adjourn until after the transcript in the removal of said cause to this court had been filed in this court.

Fourth. That said court of common pleas had ceased to do any business except to make formal orders in uncontested matters for the space of two weeks prior to the said seventh day of April, A. D. 1879, the judges of said court being absent from said Lucas County, Ohio, holding district courts elsewhere. In fact, there was at said court no opportunity for said cause to be tried after the 24th day of March, 1879. Nor had said cause, at any time in said court, been reached or called for trial before the removal of the same to this court.

Fifth. That the petition for removal of said cause to this court was filed on the 17th day of May, A. D. 1879; that the first term of this court next ensuing was begun on the 3d day of June, 1879, and the transcript of the pleadings and record in said court were filed in this court on the 5th day of June, A. D. 1879.

Sixth. That afterwards, on the 17th of September, 1879, an ad-
102 ditional transcript was filed showing the giving of an additional bond as such additional transcript shows, and the court finds the surety on each of the bonds given to be sufficient.

Seventh. That when defendant learned, May 3d, 1879, that said original and amended replies had been filed, respectively, April 3d and May 3d, said defendant did not take any steps to have said replies, or either of them, stricken from the files of said cause, nor did he so do prior to the removal of said cause to this court.

Whereupon it is found and adjudged by the court that the petition for the removal of said cause to this court was not filed in due time, and therefore it is ordered that said motion to remand said cause be, and the same hereby is, sustained; and said cause is remanded to said court of common pleas of Lucas County, Ohio; and it is further ordered that said Babbitt pay the costs in said cause in this court to be taxed, and in default thereof that execution issue to collect the same as upon judgment at law. And thereupon the said defendant, in open court, excepted to said order remanding said cause and adjudging said cause against him.

And afterwards, to wit, on the 3d day of February, A. D. 1880, there was filed in said court the following petition for an allowance of an appeal, together with the allowance thereof.

103 *Petition for an allowance of an appeal.*

In the circuit court of the United States for the western division of the northern district of Ohio.

PARKER P. CLARK ET AL., PLAINTIFFS,
v.
ALBERT T. BABBITT, DEFENDANT.

The defendant, Albert T. Babbitt, now comes and prays for the allowance of an appeal to the Supreme Court of the United States from the order made at the December term, A. D. 1879, of said circuit court, remanding said cause to the court of common pleas of Lucas County, Ohio, wherein the same had been commenced, and from which, on application of the defendant, the same had been removed to said circuit court of the United States.

ALBERT T. BABBITT,
By LEE & BROWN,
His Attorneys.

Appeal allowed at chambers, in the city of Cleveland, in said district, this 3d day of February, A. D. 1880.

M. WELKER,
Dist. Judge of said District, and Acting Judge of Circuit Court.

And afterwards, to wit, on the 3d day of February, A. D. 1880, there was filed in said court a bond in the words and figures following, to wit:

104 Know all men by these presents, that we, Albert T. Babbitt, as principal, and Cyrus H. Coy, as surety, are held and firmly bound unto Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett, in the sum of five hundred dollars, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this third day of February, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above bounden Albert T. Babbitt has appealed to the next Supreme Court of the United States from an order of the circuit court of the United States for the western division, northern district of Ohio, bearing date the 20th day of December, A. D. 1879, in a cause wherein the said Parker P. Clark, George H. Clark, Elijah F. Clark, & George B. Burnett were plaintiffs and the said Albert T. Babbitt was defendant, whereby said cause was remanded to the court of common pleas for Lucas County, Ohio:

Now, therefore, the condition of this obligation is such, that, if the above-named appellant, Albert T. Babbitt, shall prosecute his appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against him as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

105 ALBERT T. BABBITT. [SEAL.]
C. H. COY. [SEAL.]

Sealed and delivered in presence of—
H. D. STANDART.

Approved and filed Feb'y 3d, 1880.

M. WELKER, *Judge.*

106 The United States of America to Parker P. Clark, George H. Clark, Elijah F. Clark, & George B. Burnett, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal allowed in this cause, and filed in the clerk's office of the circuit court of the United States, western division of the northern district of Ohio, wherein Albert T. Babbitt is appellant and you are appellees, to show cause, if any there be, why the final order rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Martin Welker, district judge of the United States for the northern district of Ohio, acting judge of circuit court, this third day of February, in the year of our Lord one thousand eight hundred and eighty.

M. WELKER,
Dist. Judge U. S. N. Dist. of Ohio, Acting as Circuit Judge.

107 We hereby acknowledg' service of the within citation.
Feb'y 25, 1880.

KENT, NEWTON & PUGSLEY.
Atty's for Appellees.

(Indorsed:) No. 103. U. S. circuit court, north'n dist. of Ohio, western division. Parker P. Clark et al. vs. Albert T. Babbitt. Citation. Filed Feb'y 3d, 1880. O. S. Case, dep. cl'k.

108 *Certificate.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court, in the cause wherein Parker P. Clark, George H. Clark, Elijah F. Clark, and George B. Burnett are plaintiffs and Albert T. Babbitt is defendant, as the same appears from the files and records of said court, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Toledo, in said division and district, this 13th day of September, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fifth year.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

(Indorsement on cover:) No. 885. Albert T. Babbitt, appellant, vs. Parker P. Clark, George H. Clark, Elijah F. Clark, and George P. Burnett. N. Ohio C. C. U. S. Filed 28th September, 1880.

OFFICE SUPREME COURT U.S.
FILED
JAN 8 1881
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF UNITED STATES.

PARKER P. CLARKE, ET AL.,
vs.
ALBERT T. BABBITT.

Motion to Dismiss Appeal and to Affirm Remanding Order.

Brief of Appellant, A. T. Babbitt.

JOHN C. LEE,
Attorney for Appellant.

BLADE PRINTING & PAPER CO., TOLEDO.

SUPREME COURT OF UNITED STATES.

PARKER P. CLARKE, ET AL.,
VS
ALBERT T. BABBITT.

Motion to Dismiss Appeal.

Brief of Appellant, A. T. Babbitt.

The appellees make, as their first point, the claim that the order remanding the cause to the State Court, is "not a final judgment or decree, in the sense which authorizes a writ of error or appeal."

This, we admit, was ~~true~~ a valid objection prior to the Act of March 3d, 1875. Vol. 18 Stat., page 471. There was, prior thereto, no known method of arresting the effect of, or reversing a remanding order, save to except, and after *final* judgment in the Supreme, or highest Court of the State, to take resort to the Supreme Court of the United States, unless the party against whose will the remanding order was made, obtained from the Supreme Court of the United States a mandamus compelling the remanding Court to proceed with the hearing or trial of the cause. See 16

Wallace, 270; 23 Wallace, 508. Under the experience of the courts and the bar, it was well known that without any direct legislation authorizing it, the United States Courts were in the habit of remanding causes, errors in which, if excepted to, would vitiate all subsequent proceedings. So it was constantly happening that such errors compelled a party to litigate clear through a State's Courts and then, perhaps, go into the Supreme Court before he could get an adjudication, settling which Court, the State or National, of right could hear and determine the cause. To settle that question summarily, the Supreme Court of the United States, on application for mandamus to compel the Circuit Court, notwithstanding its remanding orders, to retain and proceed with the cause, would determine the question of the right of the party applying for the mandamus to have the cause retained in the National Court.

When the Act of March 3d, 1875, came into force, the first case in which we find its summary action invoked, is Hoadley vs. San Francisco. 94 U. S. 4. Here the first clause of the syllabus reads: "Under "the fifth section of the Act of March 3d, 1875, (18 "Stat., 471,) this Court has jurisdiction to review an "order of a Circuit Court dismissing a cause, or "remanding it to the State Court from which it had "been removed under the second section of that "Act." In the opinion, and on page 5, the Chief Justice says: "This is a modification of the previ- "ous legislation upon this subject, under which we "held, in Insurance Co v. Comstock, 16 Wall., 270, "and R. R. Co. v. Wiswall, 23d id., 508, that the

"remedy in such a case was by mandamus to compel "action, and not by writ of error, to review what has "been done."

With this reply to the point that this is not an appeal from a final judgment, or order, and should therefore be dismissed, we pass to the next point, to-wit: that the 5th section of Act of March 3d, 1875, has reference, in the language providing for review, not to any case that is remanded, because the petition for removal was not filed in time in the State Court.

To this we might quote, in answer, the first clause of the syllabus, in Hoadly v. San Francisco, *supra*, and say nothing more. We might inquire whether this Court meant what it said in that syllabus, and what its Chief Justice said in the opinion in that case? If to this inquiry is an answer in the affirmative made, then may we not inquire whether, in that syllabus, this Court does not mean, and give every reader, lawyer and layman, to understand, that in any and every case where a Circuit Court shall, *for any reason*, remand to the State Court, without hearing or trial, such remanding order is reviewable in a summary manner by this Court without proceeding to final judgment in the State Court? Certainly the Court then did not understand that there was *any* remanding order, based upon *any* alleged reason that was not by that section five made thus summarily reviewable.

If we look into the language of that fifth section we do not find any ground for the limited construction of it given by counsel for the appellees. Its

language is, if "such suit does not really and substantially involve a dispute or controversy properly "within the jurisdiction of said Circuit Court," &c., then the Circuit Court shall remand, &c.; * * * "but the order of said Circuit Court dismissing or "remanding said cause * * * shall be reviewable by the Supreme Court," &c.

An analysis of the first clause above quoted, gives us fairly the meaning the Court seems, in Hoadley v. San Francisco, *supra*, to have given to it. It is to the effect that the suit must involve such a controversy or dispute as the law has provided may be removed, which is determinable by one or the other of three tests:

1st. Nature of subject matter.

2d. Amount in controversy.

3d. The kind and citizenship of the parties.

And, in addition thereto, such "dispute or controversy" must be "*properly* within the jurisdiction of said Circuit Court." "Properly," refers to and embraces the *manner* of bringing it there. It means the method, the means, the channel, the time of bringing it into the Court. If removed from a State Court, is it removed in compliance substantially with the conditions of removal provided by the removal statutes? The word "properly," in that connection, refers not merely to subject matter, nor to parties, but also to procedure to put, or bring it, into the United States Court. By omitting the word "properly" entirely, we would have the meaning which opposing counsel

are insisting upon, and without supplying any omitted word or words.

Again: The reason for the summary review is just as strong, no matter upon what ground the remanding order is made. The party against whose will the cause is remanded, is deprived of his alleged right to have the case proceed and be determined in the National Court, no less because the remanding order is based on alleged irregularities or defects in the attempted removal. If, as is claimed in this case, the petition for removal was filed in due time, but the Circuit Court is of opinion that it was not, and for that reason remands, Babbitt is shut out of the National Court as effectually as if the Circuit Court had found that the subject matter was such as to forbid the removal.

Further: By many lawyers and courts (and why may it not be by Congress?) it is often said that the National Court lacks "jurisdiction" to entertain the case by reason of defects in the steps to remove. It is often said that the "jurisdiction" of the State Court is not dislodged, nor does the jurisdiction of the National Court attach, unless the statutory steps shall have been substantially complied with. This language is common in briefs, opinions and syllabi. Such is, perhaps, the meaning given to the word "jurisdiction" in the 5th section, by this Court, in Hoadly v. San Francisco. If so, the word "properly," in the section, may be treated as surplussage. The use of it does not necessarily defeat such meaning.

We may add that this portion of section 5 would be unnecessary, to-wit: "Or that the parties to said

"suit have been improperly or collusively made or "joined, either as plaintiffs or defendants, for the "purpose of creating a case cognizable or reviewable "under this Act," were it not for the sweeping character of the language, clothing with jurisdiction the Circuit Courts, where there is a controversy between citizens of different States, or foreign States, citizens, or subjects. By the above quoted provision in Section 5, the Court is empowered to look under and beyond the surface, or actual citizenship, of the parties, and ascertain whether the parties, or some of them, have not been made, or become such, to bring the case, improperly or collusively, within the provisions as to jurisdiction based on citizenship of the parties. Under this provision, although the citizenship may be all the statute requires, yet if, upon inquiry, the Court should find that the interest or position of such necessary party was acquired with a view to create the jurisdiction, in such case, the cause should be remanded.

In this connection we invite the attention of the Court to the forcible language of Judge Drummond, found in the opinion reported in 2d Central Law Journal, 275; Osgood v. Chicago R. R. Co., 275–283. He takes the ground that the 5th section of the Act of March 3d, 1875, limits the causes for which remands may be made to want of proper subject matter, and want of proper parties. Irregularities in removal are not sufficient.

Second.

The next general objection to the right to review is, that the amount involved is too small. It is in-

sisted that the right to remand is the same, as to amount in question, as upon error or appeal from final judgment or decree.

We admit the amount in question to be less than $2,000. We cannot, however, admit that no error, or appeal, to review, will lie, unless the amount in question is the same as from final judgment or decree, to-wit: $5,000.

To properly understand and answer this objection, we must recur to the language of the preceding sections of the Act of March 3d, 1875. Section 2 reads:

"That in any suit of a civil nature at law, or in "equity, now pending, or hereafter brought in any "State Court, when the matter in dispute exceeds, "exclusive of costs, the sum or value of five hundred "dollars," &c., * * * "either party may remove "said suit into the Circuit Court of the United "States of the proper district."

Then Sections 3 and 4 intervene, as to procedure in removal, after which Sec. 5 follows: "That if in any suit * * * removed from a State Court to a Circuit Court of the United States, it shall appear &c., the said Circuit Court shall proceed no further therein, but shall * * remand it to the Court from which it was removed * * and shall make such order as to costs as shall be just, but the order * * remanding *such* case to the State Court shall be reviewable by the Supreme Court," &c.

To the correct understanding of these Sections on the subject of removal, remanding and review, noth-

ing has been, in the above extracts, omitted. From them it is plain that any sum above $500 is amount sufficient for the removal, and then any *such* case may be remanded, and *any* such remanding order may be reviewed. Not a word as to amount. Had there been any intention to debar any review, save in a few cases, those above $2,000 or $5,000, such intention would have received expression.

Third.

The third and last general objection by appellees is that the review cannot be invoked by appeal, in this case, because from the final judgment the dissatisfied party could only come by Error.

We do not understand that this ground is urged, for it is the desire of both parties that this Court pass upon the legality of the remanding order, and that we know now, or so soon as practicable, in which forum the cause is to be tried on the merits. However, we suppose, that if this Court should hold that it cannot entertain the question of the legality of the remanding order, whether upon Error or Appeal, because the amount in question is less than $5,000, in such case counsel ask to have the appeal dismissed. Otherwise both parties desire the opinion and ruling of this Court on the correctness of the remanding order.

Whether this question in review should have been brought here by writ of error or appeal, was difficult to determine. Just what the Statute means by the phrase in the latter part of the 5th Section of the

Act of March 3d, 1879, "on writ of error or appeal, as the case may be," does not seem quite clear, as the facts, involved in the question of remanding, are not distinctively addressed to either the equity or law side of the Court, and the order itself cannot be said to be distinctively of one or the other kind, the solution of the question is not in the least aided by considering either or both. It can scarcely be said that if a case at law is remanded, the review must be on error, and if a Bill in Chancery, it must be reviewed by appeal. Is not the alleged ground, upon which the remanding order is based, the same in equity as at law, if it be the failure to file the petition for removal in time?

We took it that error or appeal might be resorted to, according to the convenience of the party in presenting the controlling facts or points of law. The allowance of either is in the breast of the remanding Court. By either method, the same facts are brought under the eye of the reviewing Court. Appellant took exception to the remanding order on the record.

Appeal was resorted to in Hoadly v. San Francisco, 94 U. S., 4. In Hurst v. Hollingsworth, 94 U. S., 111, both appeal and error from a final judgment or order were taken, in a case of doubt, and a transcript of the record was filed. On motion to dismiss the Court say, "There was but one action in the Court "below, and there is but one record. * * He has "but one cause; and when we come to examine it, "we will determine whether it is properly here by "appeal or by writ of error, and will proceed accord-"ingly." In this appeal by Babbitt he brings the

whole record and lays it before the Court. If there are other reasons, than that relied upon by the remanding Court to make the remand, they are open for inspection and action upon them.

Again: In 96 U. S., 199, Gold Washing & Water Co. v. Keyes, which was in the nature of a Bill in Equity, begun in a State Court of California, and by that Court ordered to be removed to the S. C. U. S., and by this latter Court it was remanded, and under 5th Sec. of Act of March 3d, 1875, this remanding order was reviewed *on Error*. The question arising on the remanding motion, and its review, was, whether the subject matter of the suit was such as to warrant the removal.

Again: In 101, U. S., 610, Bible Society v. Grove which was in the nature of Chancery, it being a suit to set aside a Will, begun in a State Court of Missouri, and removed to the C. C. U. S. Wes. Dist. of Mo., this latter Court, on motion, remanded it, because the petition for removal was not filed in due time, and under the 5th Sec. of Act of March 3d, 1875. To reverse that order *Error* is taken to this Court, and on consideration the remanding order was affirmed.

With these two cases, in Chancery, revised *on Error*, [illegible]em. con., and the Chancery case of Hoadly v. San Francisco, *supra*, reviewed on Appeal, we must leave this Court to decide for us where the line shall be drawn between Error and Appeal in this summary examination, for we cannot.

Proceeding to the consideration of the main question, the legality of the remanding order, we submit the following:

SUPREME COURT OF THE UNITED STATES:

CLARKS
vs.
BABBITT. } *Appeal from C. C. N. D. O.*

In this action, begun in the Common Pleas of Lucas County, Ohio, Clarks seek to recover on a judgment rendered in the Common Pleas of New York City. To this Babbitt made answer, within rule, on the 4th day of January, 1879. In his answer, among other matters, he sets up that he had been discharged from liability on the judgment, by composition proceedings in bankruptcy, and also that Clarks had received the composition money, and, under the operation of the bankrupt law, they could not claim any more.

To this answer the Clarks should have filed reply on or before January 18th, 1879, according to the provisions of the code. The plaintiffs did not file any reply until April 3d, 1879, and they did it then out of rule, without leave of Court, or notice to or consent of Babbitt or his counsel. Neither Babbitt nor his attorneys had any knowledge of any reply having been filed until after the term of Court pending when the reply was filed had adjourned; nor did he or his attorneys have any knowledge of the filing of a reply until after an amended reply was filed, which was done without leave of Court and without notice to or consent of Babbitt or his attorneys, on

the 3d day of May, 1879. The terms of the Common Pleas Court began and ended as follows: January 6th, 1879, began, and ended April 7th, 1879. The next term began April 28th, 1879, and adjourned in July, 1879. The Court had ceased to do anything but make uncontested orders for two weeks before its adjournment of April 7th, and the term practically ended on the 24th day of March, and no causes could have been tried after the 24th day of March.

On the 17th day of May, 1879, the petition for removal was filed, with bond. The State Court ordered the removal, and the record was filed in the National Court on the 5th of June, 1879. The National Court began its term on June 3d, 1879, and the twenty days from May 17th would not expire till the 6th of June.

The bond for the removal, as filed May 17th, with the petition, was conditioned for filing copies of all pleadings, depositions, process, &c., "and shall do "such other appropriate acts as by the Act of Con- "gress in that behalf are required to be done upon "the removal of such suit from said State Court into "the United States Court." The motion to remand was filed in June, and after, and prior to the hearing of the motion to remand, Babbitt filed an additional bond in the case, in the Common Pleas, and caused a certified copy of the same, and the fact of the approval and filing of the same, to be filed in the Circuit Court before the motion to remand came on for hearing. This latter step was not deemed necessary, but it was done so as to have on file an undertaking,

haec verba, conditioned for the payment of costs in the event that the cause should be remanded.

The grounds alleged in the petition for the removal are two:

1st. Parties are citizens of different States.

2d. There are questions arising under the laws of the United States.

The reliance is on the second ground, as it has been held that a citizen of a Territory is not a citizen of a State within the meaning of the Removal Statutes, and Babbitt was a citizen of Wyoming Territory.

As to the second ground, I do not think there can be two opinions about it. The construction of the Bankrupt Act and its amendments is decisive of the case, if the facts set up in the answer are established.

As the motion to remand was urged mainly on other grounds, I pass to them at once. They are two:

1st. Petition to remove was not filed in time.

2d. The removal bond is defective.

1st. Plaintiffs insist that the petition for removal should have been filed at the January term, 1879, instead of the April term.

The January term closed April 7th, 1879, and the April term began April 28th. The petition for removal was filed at the April term, May 17th.

The ground for this claim is, that under the Removal Act of March 3d, 1875, the January term is

the one at which the cause "could first be tried." The answer of Babbitt was filed within rule, January 4th, 1879. The reply should have been filed January 18th. It was not filed till April 3d. Then it was filed out of rule, without leave of Court, and without the knowledge or consent of Babbitt. Neither Babbitt nor his counsel knew that the reply was filed till after May 3d, 1879, on which day an amended reply was filed, likewise without leave and without the knowledge or consent of Babbitt or his counsel. By that time the April term had begun.

Babbitt was not bound to compel the filing of a reply. He lost no rights by failing so to do. His failure so to do did not give Clarks a right to drop into the Clerk's office a reply, out of rule, without leave of Court, and without the consent of, or notice to, Babbitt. Babbitt was bound to keep watch of the files, for a reply, until the rule day for filing reply had passed, but not after that. The reply after that day could go upon file only upon leave of Court, or with consent of Babbitt. It went on without either. No knowledge of it being on file was brought to Babbitt until May 3d. This was after the next term of Court had begun. On the same day the amended reply is put on file in the same manner, without leave of Court or consent of party. After that, but on the same day the first knowledge of the filing of the original and amended reply is had by Babbitt or his counsel. In right and law neither of the replies are properly pleadings at that time. Certainly no rights should under them be gained by the delinquent

pleader. Certainly no rights of the adversary should be lost by reason of them. It is the right of Babbitt either to have them stricken from the files, or to insist that he is in no manner, and in no measure, prejudiced by their unauthorized and unpublished filing. Had Babbitt insisted upon having them stricken from the files, the motion might, *pro forma*, have been granted; but on request of plaintiffs to re-file them *instanter*, they would have been on the files again *instanter*. Such a performance might have been, technically, the thing to do; but can it be said that Babbitt should lose anything by failing so to do? The Court ought, and certainly will not, permit him to lose anything. It is claimed that by reason of Babbitt not attacking and having such replies driven from the files, he thereby not only waives all objection thereto, but affirms the unauthorized filing, and his waiver and affirmance are made to relate back to April 3d, and thereby to shut him up to the necessity of filing his petition for removal at the term of Court which ended April 7th, 1879.

Certainly this can not be. An unauthorized filing of a pleading is, in law, no filing. No one, to be affected by such pleading, can be so affected until he shall have notice, actual or constructive; and of an unauthorized filing there can be no constructive notice. An unauthorized filing at one term may, if unobjected to until another term, at such second term acquire the character of an unobjected to filing, but only as of such second term. Were any other rule to prevail it would be offering a premium to

laches, and punishing the adversary for not insisting upon the punishment that should be visited upon the *laches*.

Had the reply filed April 3d been so filed, either upon leave, or with the knowledge or consent of Babbitt, no trial of the cause could be had at that term, because the Court ceased to hear or try any contested matter two weeks before April 7th, the time of adjournment *sine die*. Under this state of facts, what is the interpretation of the statute? What, in this case, is the term at which it "could be first tried?"

a. It is plain that it was impossible to try the case at the January term, after the reply was filed, as a matter of fact.

b. The filing of the reply made an issue for trial on the answer, out of which arises the question under the laws of the United States.

c. That question was not made and did not arise until the reply was filed; but in law that reply was not filed by leaving it in the Clerk's office without leave, notice or consent.

d. The main reliance of Babbitt for a ground on which to remove the cause is, that in it is a question under the laws of the United States, to-wit: the Bankrupt Acts.

e. It would seem that Babbitt could not be shut off from filing petition for the removal of his cause at any time when the question under the laws of the United States is made.

f. That question is made by the filing of the reply, and then for the first time does any right of removal accrue to Babbitt. He cannot be held to the requirement to file his petition for removal before the ground for the removal shall have appeared.

g. The language, "at the term at which it could be tried," is not to be so construed as to prevent the removal of a cause, but is to be so construed as fairly and reasonably to give opportunity for removal.

It is insisted that if the issue was made up, no matter how short a time before the term closes, it is only at that term that the petition for removal can be filed. It would seem that such a view is not tenable. Suppose, as in this case, that it requires a reply to make the issue, in which is brought out a subject matter cognizable in the United States Court, and that reply is not due till Saturday. It is filed just as the Clerk is closing his office on Saturday. There is no time to make a copy of it. The defendant can not get even an inspection of it till Monday morning. So soon as the Clerk's office opens Monday morning, the Court opens, and adjourns, *sine die*. The issue is made up on Saturday. The cause may be tried at that term. Yet it would be the merest mockery to insist that the defendant is denied a right of removal because he did not file his petition for removal before the term closed. Such an illustration shows, that in fixing the time within which a removal petition, by a party not guilty of *laches*, should be filed, the Court can not do less than to give him a reasonable time in which to prepare and

file the petition, after the issue is made by a pleading filed in rule, or after he has notice that it has been made by a pleading filed out of rule and without leave of Court.

It is alleged, however, in answer to this, that by the Ohio code, the cause should be deemed to stand for trial at any time when the reply was due, whether filed or not. In one sense that is correct; but in a better and more practical sense, it is not correct. It is a rule of all practice, in the trial of causes, that they can not be tried until issues are made up, according to the laws and rules of pleading. Only when issues are made up can causes be tried. The pleadings in Ohio making issues of fact are the petition, answer and reply. The new matter in an answer not denied is deemed admitted; but the new matter in a reply is deemed denied.

It often happens, in Ohio, and elsewhere, that questions of jurisdiction and others of a preliminary character are made, the determination of which in fact do necessarily extend long beyond answer and reply days. Shall it be said, that after these are disposed of, and by the answer and reply a question under the laws of the United States is made, that it is too late to seek the removal? To this, certainly no answer is necessary.

What then is and should be the construction of the statute for Ohio, and every other State? The rule should be, as it may easily be made, uniform throughout the States. We answer the question by saying: "The application for removal may be made

"by either party, at or before the term of Court, at "which, under the laws of the State, and the rules of "practice, the cause would first regularly stand for "trial, on its merits, upon issues which have been "joined between the parties by their pleadings."

Supportive of this view I will cite some authority. The first is that of Chief Justice Waite, 1st Hughes' C. C. Reports, page 270, Gurnee v. the County of Brunswick, tried at Richmond, Va., in 1876. Chief Justice Waite, presiding, said:

"The law requires that the petition for removal "shall be filed in the State Court 'before or at the "'term at which the said cause could first be tried, "'and before the trial thereof.' It cannot be tried "until in some form an issue has been made up for "trial. The pleadings or statements necessary to "make the issues are regulated by the practice in the "Court where the trial is to be had. As soon as the "issue is made up the cause is ready for trial. The "parties and the Court may not be ready, but the "cause is. The first term, therefore, at which a cause "can be tried, is the first term at which there is an "issue for trial. An application for removal, to be in "time, must be made before or at this term."

The language above quoted seems to be clear and not susceptible of modification by the facts of any particular case.

The second case I will cite is that of Mich. C. R. R. Co. v. Andes Ins. Co., 9th Chicago Legal News, page 34. The facts in the case are as follows:

The Railroad Company sued the Insurance Company to recover for a loss by fire, in the Superior Court of Cincinnati, October 4th, 1873. The Insurance Company answered in due time, setting up the limitation or year clause in the policy. No reply was filed. No action was taken in the cause till February, 1876, when the Insurance Company applied for a removal to the United States Court, and filed the record, &c., in the Circuit Court at the April term of 1876. Motion was made to remand solely on the ground that the application was not made in time to the State Court, or, more specifically, not made at or before the term at which the cause could have been first tried. This decision is by a careful Judge, who is thoroughly familiar, both as member of the bar and of the bench, with Ohio laws and practice. The short opinion of Judge Swing seems pointed and well considered:

"But it is claimed that the application for removal "was not made in time to the State Court. In other "words, that it was not made at or before the term "at which the cause could have been first tried after "the passage of the Act above mentioned, plaintiff "contending that the case was at issue and ready for "trial at, and long before such passage, while the de- "fendant maintains that the issue was, and is, incom- "plete, for want of a reply to its answer, and that no "trial could or can properly occur until such reply "be filed, and that the general averment in the peti- "tion of performance of all conditions of the policy "relates, as expressly provided by the Ohio code "only to conditions precedent, and does not apply to

"or cover conditions subsequent, or such as are "required to be plead specially in order to be made "available as a defense, and that the plea of the year "clause, or limitation, set up in the defendant's an- "swer, is of this character. The pleadings, under "the Ohio code, other than motions and demurrers, "are limited to a petition, answer and reply.

"The question, therefore, for the determination of "the Court is, Was the application for the removal "of the cause made in time? It was not made at the "first term after the passage of the law of March 3d, "1875, and if at that term the cause could have been "tried, the application for removal was too late, and "whether the cause could have been tried at that "time, depends upon the answer to the question, "*whether it was then at issue.* Without entering into "an extended discussion of the general doctrine of "pleading, we are of the opinion that the answer of "the defendant, setting up the limitation as provided "in the policy, required of the plaintiff a reply. That "reply not having been filed, the cause was not at "issue, and could not have been tried at any time "before the passage of the law in question, (Act of "March 3d, 1875,) and before the term at which the "application for removal was made."

The motion to remand was overruled.

The third case I cite is, Phœnix Life Insurance Company v. Sættle, (Ohio S. Reports, Vol. 33, 278.) The case was decided by the Supreme Court Commission, Judge Scott delivering the opinion. The

case was before the Court on Error to the Superior Court of Montgomery County. Sættle brought her action July 23d, 1873, against the Insurance Company; but the latter made no appearance till February 16th, 1874, to which time the case had been continued from term to term of one month each, but at whose instance does not appear. The action was on a policy of insurance on the life of her husband. Then the Company filed an application for removal to the U. S. Court, under then existing laws. In June, 1874, this application was refused. The case was then continued from term to term, till May 26th, 1875, without any answer, when the Company filed another application for removal, under the Act of March 3d, 1875, on the ground of citizenship of parties. The removal was disallowed May 31st, 1875, and in due time thereafter the cause was tried in the State Court, and judgment rendered against the Company. Exceptions to the disallowance were taken, and to the judgment, &c., and on Error the Supreme Court Commission reviewed the order disallowing the removal, and reversed the judgment, and remanded the cause with instructions to have cause removed. The opinion on this question is in the following language:

"Finally, it is objected to the regularity of the "second application for removal, that it was not "made and filed within the time prescribed by the "Act of 1875.

"The third section of that Act requires that the "application be made and filed in the State Court

"'before or at the term at which said cause could be "'first tried, and before the trial thereof.' Here the "question arises, What is the term at which said "cause could be first tried? The meaning of this "expression is, perhaps, not so clear as to be free "from doubt. Does it mean the first term at which, "under the laws of the State and the rules of prac- "tice, the cause would first regularly stand for trial, "on its merits, upon issues which have been joined "between the parties by their pleadings, or, the term "at which the cause would first have thus stood for "trial if neither party had been guilty of any de- "fault in pleading? We are not aware that any "authoritative construction has yet been given to "this clause by the Supreme Court of the United "States. But the question of its proper construction "has more than once arisen in the Circuit Courts of "the United States, as well as in State Courts of "high respectability. Thus it arose in the Fourth "Circuit, in the case of Gurnee v. the County of "Brunswick, tried at Richmond, in 1876, Chief "Justice Waite presiding. In discussing the ques- "tion the Chief Justice said: 'The right of removal "'is a statutory right. To support the jurisdiction "'of this Court, therefore, the plaintiff must bring "'himself strictly within the provisions of the stat- "'ute. The law requires that the petition for "'removal shall be filed in the State Court before or "'at the term at which said cause could first be tried, "'until, in some form, an issue has been made up for "'trial. The pleadings or statements necessary to "'make the issue are regulated by the practice in

"'the Court where the trial is to be had. As soon "'as the issue is made up the cause is ready for trial. "'The parties and the Court may not be ready, "'but the cause is. The first term, therefore, at "'which a cause can be tried, is the first term at "'which there is an issue for trial. An application "'for removal, to be in time, must be made before or "'at this term.' 1 Hughes, C. C., 270.

"The same construction was given to this clause "by Judge Drummond, of the Seventh Circuit, in "Scott v. Clinton & S. R. R. Co. 6 Bissel, 529. In "that case, it is true, it was found necessary to decide "whether the parties seeking a removal could be "guilty of such *laches* as to prevent it, although an "issue had not been made up, and the cause might "not be ripe for hearing. But as the statute of 1875 "gives the right of removal to each of the parties "alike, we should find it difficult to hold that the "term at which the cause could be first tried means "one thing as to a plaintiff, and a different thing as "to a defendant.

"So in Warner v. Penn. R. R. Co., 13th N. Y. Su- "preme Court Reports, (6 Hun.) 197, it was held "that the statute requires the application for removal "to be made before or at the first Court having "authority to try cause, *after issue* has been joined, "or, in cases pending, *and at issue*, when the law "went into effect, at the first Court afterward held "for which it could be noticed for trial." * * "It "follows that as the second application for removal "was made to the Court below, before any issue was

"joined between the parties by the pleadings, it was "made before the term at which the cause could be "first tried, within the meaning of the statute.

"Under the Act last named, (March 3d, 1875,) the "application for removal may be made by either "party, at or before the term of Court at which, un- "der the laws of the State, and the rules of practice, "the cause would first regularly stand for trial on its "merits, *upon issues which have been joined* between "the parties by their pleadings."

We hope the Court will not fail to note the fact that in the case of Phœnix Life Insurance Company v. Sættle, the applicant for removal, had been in default for answer before filing application for removal, more than one year and a half, and was so in default when the second application was made. In the case at bar the default for pleading is not with the applicant for removal. The motion to remand comes from Clarks, the parties who were in default for reply, and who sought to take advantage from that default.

In the case at bar, too, the removal does not proceed on citizenship alone, but on the subject matter, a question under the laws of the United States, and that question made by the coming-in of the reply.

In the last two preceding authorities cited, we repose much confidence as to the declaration of the rule to be applied to causes removed in Ohio. Judge Swing has been an active practitioner, or Judge, somewhat prior to, and ever since, the adoption of the

present form of pleading in Ohio, and the Supreme Court Commission was a court co-ordinate with the Supreme Court itself. Two of its five members had served on the Supreme bench not less than ten years each, and a third is now in that court. Its decisions rank with those of the Supreme Court itself. None of them had so far progressed in the liberal notions of modern days, as to pleadings and issues made by them, as to believe it practicable to try causes without issues. They believed with the Chief Justice of this court, in 1. Hughes, *supra*, that "a cause cannot be "tried until in some form an issue has been made up "for trial." To the Ohio Code of Practice they apply this ancient notion of the profession. They had full before them the provisions of sections 103 and 308 of Ohio Code of Practice, Revised Statutes of Ohio, sections 5,097 and 5,135, to which counsel for the opposition refer. They were well aware that a reply is due, on file, on or before the fifth Saturday after the return day of the summons; that actions are triable at the first term of the court, *after the issues therein*, by the time fixed for pleading, are, or should have been, made up; that when the issues are, or should have been made up during a term, such action will be triable at that term; and that when the issues are or should have been made up, either before or during a term of court, but after the period for the preparation of the trial docket of the term, the Clerk, if required by the Court, shall place such actions on the trial docket of that term.

Of all these things they were fully apprised. They did not see in any of them an intention in the Leg-

islature to set courts at work to try causes without having issues, first made up to be tried. They probably saw that in making a cause begun at a given time, triable in three or five weeks from the return day of the summons, it was simply dispensing with appearance and trial terms, and giving another rule by which to determine trial term or time. Times, when either party may insist upon having issues made up, and trial of them had, may be changed, but in the nature of all controversy, *issues for trial will ever remain the same.* Had these Judges and Courts been passing upon the case at bar, they would have said there was no issue to try until the reply came in, and they would further say that a reply that is filed out of rule without leave of Court, and without the knowledge or consent of the opposite party or his counsel, is not filed at all. Hence, they would have said, that no issue was made on the answer of the defendant, until May 3d, 1879, when defendant first knew reply was filed. The April term was then already begun four days, and within fourteen days thereafter the petition for removal was filed.

The next case, the fourth that I will cite, is Scott v. C. and S. R. R. Company, Chicago Legal News, 8th volume, page 210 (March 25th, 1876,) and 6th Bissell, 529.

This case was before Judges Treat and Drummond on a motion to remand. Judge Drummond says: "When is the term at which the cause could "first be tried?" * * "Could this cause have "been heard or tried before this application was

made?" * * "But in this case there was not "only no issue when the application was made, but "there was no answer filed by the parties." * * * "The object of this provision of the law (act March, "1875,) was to prevent parties from making an appli- "cation after the term when the cause could have "been tried. Now, the *cause can not be heard until "there is an issue;* and in this case, therefore, it was "not competent for the court to try the case, there "being no issue before the court to try; and, there- "fore, I think that within the meaning of the law, a "term had not elapsed during which the cause could "have been heard."

The foregoing case was heard and decided, and again, at the instance of the party seeking to have it remanded, it was reargued with the same result. It was a well-considered opinion.

The fifth case I cite, is Warner v. Pennsylvania R. R. Company, sixth Hun. 197, Supreme Court of New York. Opinion by Daniels. By the rule of practice in New York, causes when issues have been joined may be "noticed for trial." We give the holding of the court: The act of March 3d, 1875, requires the petition for removal to be made "before or at the "first Court having authority to try the cause after "*issue has been joined*, or, in the cases pending, and "at issue when the law (of 1875) went into effect at "the first court afterward held for which it could be "noticed for trial."

I will cite on this branch of the case one more authority, 7th Bissell, 440, Pettilon v. Noble. In this

case, which was begun in a State court in Illinois, in December, 1873, such proceedings were had, that it went to the Supreme Court of the State, from which it was remanded for a new trial. The reversal and remanding occurred January 30th, 1875. April 15th, 1876, on motion of counsel for defendants who had procured the reversal, the cause was redocketed below. October 14th, 1876, the defendant, the Central National Bank, filed petition for removal. November 3d, 1876, an application was made by defendants to set aside the redocketing order, on the ground that the attorney who had moved it, acted withont authority. This motion was granted. The cause was redocketed November 3d, 1876, and then ordered to be removed, which was done. On motion to remand, Judge Blodgett held: 1. "A case pend-"ing in the Supreme Court of a State at the time of "the act of March 3d, 1875, was passed, and which "was remanded from such Supreme Court for further "proceedings, stands like a new case, and conse-"quently the right of removal may be claimed at or "before the term at which the case can be tried."

2. "The defendants not being obliged to redocket "the cause, are not bound to take affirmative action "for a removal, until the complainants have caused "the cause to be redocketed, *of which they are enti-"tled to due notice.*"

This authority is cited principally for the purpose of sustaining the claim I make, that Babbitt was not debarred from filing his petition for removal, until

Clarks had put in the delinquent reply, and even then not till Babbitt had notice thereof.

There are some other authorities bearing on this question that we will notice. In these the doctrine is sustained that *an issue is necessary* to the trial of a a case, and an issue was *contemplated* in the third section of the Act of March 3d, 1875. The first is Huddy v. Havens, 4th Weekly Notes of Cases, 20, decided April 21, 1877, by Judges Kennan and Cadwallader. Case had been removed from Common Pleas, and the hearing was on petition to remand. Suit in covenant, from term 1875. The cause was at issue from term 1876, but not ordered on trial list till December, 1876, and was published in February list of 1877. After this, rule for removal was taken, but refused. Then, a copy of the record having been filed in the C. C. U. S., this application to remand was made. In deciding, the Court says: "It is urged further that by the practice and rules of "the Court the cause could not possibly have been "put on the trial list in September. It does not, "however, appear that the cause was *legally* incapa- "ble of having been tried at that term. The Presi- "dent Judge of that Court (Hare) disposes of the "question in concise and emphatic language (Huddy "v. Havens, 5th Weekly Notes, 432): 'The next "'term, under the Act of March 3d, 1875, means the "'next term at which the case could *legally* be tried, "'not actually.' If, owing to the crowded state of "the docket, a case could not be reached till the third "term *after it was at issue*, a petition to remove it "then is too late. Apart from the fact that the Com-

" mon Pleas has impliedly stated that the cause could " *legally* have been tried before the term in which it " was removed, it is a much wiser rule to proceed by " the record, which shows that this cause *was at issue*, " *and therefore legally triable* in the June term, 1876, " than to adopt a rule which would require the Court " to take testimony in every case, to ascertain whether " the cause was removable or not."

The second case is, 4th Dillon, 260, Ames v. C. C. R. R. Co. The second clause in the syllabus says: " Under that Act (March 3d, 1875) application to " remove a cause must be made to the State Court " at or before the term in which, according to the " local law and practice of the Court, the cause could " have been finally heard. Accordingly, where *issue* " *was joined* nearly one month before the end of a " term of the State Court, and it does not appear but " that a final hearing could have been had at that " term, an application thereafter made to remove the " cause under the Act of March 3d, 1875, will be " denied." In the opinion, pg. 263, the Court says: " It appears that *issue was joined* on the 24th day of " July, 1876, and the Court remained in session for a " period of twenty-eight days thereafter." * * * " So far as the record shows, the cause could have " been brought on at any time within the twenty- " eight days that remained of the term after *issue* " *was joined*."

The third case is 122d Mass., 431, 2. Warehouse and Security Co. v. Loomis. It is the decision of the Supreme Court of Massachusetts. The syllabus

is: "Under the U. S. statutes of March 3d, 1875, "§ 3, providing that a petition for the removal of a "cause from a State court into a Circuit Court of the "United States, must be filed 'before or at the term "'at which it could be first tried, and before the trial.' "Such a petition filed before trial, at a term of this "Court subsequent to that at which the case was "entered, *and at issue*, is too late, although the case "has been first put upon the trial list at the term at "which the petition is filed."

In the opinion, C. J. Gray says: "The manifest "purpose and effect of this enactment are that a "party, who intends to remove a case from a State "court into a Federal for trial, shall do so, not only "before the trial in the State court, but at the first "term at which a case *is at issue for trial and might* "*be ordered to be tried there.* By our practice act, an "action at law is deemed *at issue* as soon as the "answer is filed, and no further pleading is required, "except by order of the Court." * * * "The "present case was, therefore, *at issue*, and could by "the law and practice of this commonwealth have "been tried at April term, 1875, at September term, "1875, or at April term, 1876, and this petition for "removal, filed at September term, 1876, comes too "late."

Again—

Search has been made faithfully to find any cases decided by any Court, in which it is held that a petition for removal is required to be filed before *an issue* has been made. We do not find them outside

of the Eighth Judicial District, and but two of them therein. One is by Judge Dillon, and the other by his successor, Judge McCrary.

The first of these is found in 4th Dillon, 559. Atlee v. Porter.

It arises on a motion to remand a cause removed from a State court of Iowa. Petition at law was filed in State court November 25th, 1875. At August term, 1876, on motion of defendants, a more specified statement of the cause of action was ordered and the cause continued. At February term, 1877, plaintiffs amended their petition, and defendants demurred, demurrer was overruled and cause again continued. Answer was filed in vacation, May 9th, 1877. No replication was necessary, and the answer *completed the issues.* At the next term, August, 1877, application for removal was made by defendants on the ground of citizenship of parties, and the removal was ordered.

The motion to remand stood alone on the ground that the petition for removal came too late. On this alone the remand was made. As the petition for removal was at the first term after issue made, Judge Dillon, who decided the motion, was compelled to and did say that in Iowa, the term when the case could be first tried, might be *before an issue* was joined. He did not have the disposition to say, at least he did not say, that any "cause could be tried" without having an issue to try, but did say and hold, that because the Iowa practice act said, "Except "where otherwise provided, causes shall be tried at

"the first term after the legal and timely service has "been made," no respect is to be had as to whether there was an issue joined. To us this holding seems to have been based upon a want of any view whatever of the plain fact, known throughout the profession everywhere, that in every court where pleadings are used, trials are always had on issues made and joined by such pleadings. While the statute of Iowa dispenses with appearance and trial terms as such, it has not dispensed with issues in pleadings, as the subjects of trial. Notwithstanding the above quoted language of the Iowa practice legislation, no one will insist, that before any case was triable, could be tried, even in Iowa, there must be an issue joined to be tried. Will any one, upon consideration, insist in seriousness, that after "timely notice," a case can be, or will be tried, by reason of mere lapse of time, whether there is or not such a preparation of the case in pleading, as will bring the Court to its trial on issues joined on the merits? The learned jurist seems to rest this peculiar view wholly upon the extract from the legislation above quoted. He considers that it gives to Iowa a special and peculiar rule in respect to the time in which removals must be initiated. The third clause of the syllabus is: "In view of the specific provisions of the code of "Iowa, definitely fixing the time for the trial of law actions, the time for the removal, under the act of "March 3d, 1875, cannot be extended by the circum- "stance, that in point of fact the issues are not made "up at the first term. It might be different in the ab- "sence of statutory regulation as to what shall be "the trial term."

The other case is found in 10th vol. Reporter No. 6, pg. 162, Murray v. Holden. This was a motion to remand a cause removed from a State Court of Missouri, because the petition to remove came too late The ground of removal is not given, and but a meagre report of the cause is given. It is stated in the record that the action was "brought in the "Circuit Court of Jackson County, Missouri, to the "September term, 1878, and could have been tried "at that term if the issues had been joined" The cause was heard on demurrer at that time, and the demurrer taken under advisement until March term, 1879, when it was overruled, and petition for removal filed.

In the course of its opinion, after following the holding of Judge Dillon in the Iowa case, the Court says, "The statute (act March 3d, 1873,) does not "contemplate any delay for the purpose of settling "the pleadings in the State Court. These can be "settled in the Federal Court after removal if nec-"essary."

This view of the case would preclude in the Eighth Judicial District any suitor from removing his cause, whose ground for the removal was in subject matter and that subject matter did not appear, until made in the course of pleadings, but unfortunately after the first trial term.

We here cease the citation and analysis of authorities on this point, and will make some suggestions as to what is and should be the correct interpretation of the statute. In considering at such length as

we have, the authorities *pro.* and *con.*, we have not forgotten that none of these authorities are authoritative in this Court. They are at most argumentative, persuasive, and in that regard only to the extent that they in reason and the great necessities of the interests involved, commend themselves to the deliberate and matured consideration of this bench. It is for this Court, in the first reported instance, to construe this statutory provision. Whether that construction shall be such as to give a common rule for all inferior Courts, State and National, remains to be seen. It is claimed by opposing counsel in this case, and by one Court at least, that this Court cannot so apply the statute in the several States as to give it a uniform operation throughout the States. To this claim we must dissent. To us there is no serious difficulty in discovering a *just* and *uniform* rule. That *uniform* and *just* rule, WE do not pretend to have discovered. It was the most obvious construction presenting itself. The Chief Justice announced it in Gurnee v. the County of Brunswick, 1. Hughes, C. C., 271, in June, 1876. On page 276, he held this language:

"The law requires that the petition for removal "shall be filed in the State Court 'before or at the "'term at which said cause could be first tried, and "'before a trial thereof.' *A cause cannot be tried "until in some form an issue has been made up for "trial.* The pleadings or statements necessary to "make the issue are regulated by the practice in the "Court where the trial is had. As soon as the issue "is made up, the *cause* is ready for trial. The parties

"and the Court may not be ready, but the cause is. "*The first term, therefore, at which a cause can be* "*tried, is the first term at which there is an issue for* "*trial.* An application for removal, to be in time, "must be made before or at this term."

In March, 1876, three months earlier, in the Seventh Circuit, Judge Drummond was interpreting the same provision of the statute. Scott v. C. & S. R. R. Co., 6 Bissell, 529, in these words:

"The term at which a cause could be first tried, "within the meaning of section 3 of the Act of "March 3d, 1875, is the term at which the issues are "first made up, the party applying for removal not "having been guilty of negligence." Again, on page 536, the learned Judge says: "Now, the cause can "not be heard until there is an issue; and in this "case, therefore, it was not competent for the Court "to try the case, there being no issue before the "Court to try."

Any other interpretation or rule, must fail to give the full measure of right to remove, plainly covered by the statute. Where the ground of removal is the citizenship of the parties only, and that citizenship exists at the time of the commencement of the action in the State Court, the reason of the rule to await an issue made up, before applying for removal, may not be so manifest. But if, as in the case in hearing, the ground of removal is that a question under the laws of the United States is involved, and that question is not made manifest, nor, in fact, does not exist until the issues of fact are finally made up; and if, as is

not uncommon, important and difficult questions arise on demurrer, in good faith, to the petition, whose determination require so much time as to carry the case beyond first nominal trial term, and thereafter for the first time, such questions of National hue appear in the issues of fact, the narrow rule contended for by the appellees would forbid, absolutely, any removal. It is only when the issues are made up that Courts can know what kind of questions are involved. In every Court in which pleadings are used, at some time before the case is finally tried, there is an issue of some kind made. Be that when it may, the term at which it occurs is the term for filing the petition for removal, provided the making of the issue, and the close of such term, are such reasonable interval apart in time as to allow of the preparation and filing of such petition for removal.

Should this Court adopt for Ohio the interpretation insisted upon, because of the alleged similarity in her practice code, as to time that all causes are triable, to that of Iowa, in any case where the ground for removal did not appear till after the first term at which the case was triable, there could in fact be no removal.

Upon this point we make no further citations or remarks.

SUFFICIENCY OF BOND.

The remaining point made in the motion to remand is the bond for removal is insufficient in form.

By the act of 1875, the applicant must give a bond, in which, among other things, he and his surety shall undertake to pay all costs in the United States Court, in case it is remanded. The bond, as given, did not in terms, *haec verba*, so undertake. It did undertake, however, in addition to the requirements in former removal acts, to-wit: "that the applicant "would enter in the United States court on the first "day of the session, a copy of the record in said suit, "and do such other appropriate acts as by the act of "Congress in that behalf are required to be done "upon the removal of such suit from said State "court."

Can there be a fair doubt, that under the statute one of the requirements is that he shall, in case the United States Court shall hold the cause to have been wrongfully removed, pay the costs that may be awarded against him by reason thereof? In case the Circuit Court should remand the case, might not it award the costs of the removal against him? and in case of failure to pay, then might not the bond be proceeded upon, and one of the assignments of breach be non-payment of the costs awarded? In the condition of the bond the word "removal" is a word of *general* character and meaning, embracing everything from the time of filing the petition for removal, to the final remanding of the same. Bonds and stipulations for costs, are, for the most part, quite informal. In Ohio, it is enough to write on the petition "Good for costs," and sign the name. Another form is, "I acknowledge myself bail for

costs." The ordinary stipulation for costs is nothing more than this in the Circuit Court. The form of the original bond was an inadvertence, as the petition describes a bond, proper, in form.

As heretofore stated, the applicant, Babbitt, since the filing of the motion to *remand*, but before its hearing, filed in the case, in the State Court, an additional bond, unobjectionable in amount and surety, specifically undertaking to pay any and all costs that might be awarded against him in case it was wrongfully removed, &c. A certificate of the filing of such bond, and a certified copy of such bond, was likewise filed in this Court before the hearing of the motion to remand was begun. If that bond is effective, it would seem that all the purposes to be subserved in filing such bond are met by this *additional* bond. The fact that it was not filed at the time of the filing of the petition for removal, would be no defense to an action on it, in the mouth of Babbitt or his surety. If, in any event, it was not a strictly statutory bond, it would nevertheless be a good common law bond, and serve all the purposes of a bond in the case.

The petition for removal recites that bond is offered, which, among other things, provides for paying all costs that may be awarded by said Circuit Court, if said Court should hold that this suit was wrongfully or improperly removed thereto.

Upon this matter there is, however, another view to be taken. In his book on Removal of Causes, Judge Dillon says on page 65: "But if the Circuit

"Court should hold that the suit was removable, it "would not probably dismiss or remand it, because "the bond did not contain this condition as to costs, "or was otherwise informal. This section has been "construed by the learned Circuit Judge of the Sev- "enth Circuit, who holds that 'it did not intend that "'the suit should be dismissed or remanded on ac- "'count of irregularities, provided it satisfactorily ap- "'peared that the Circuit Court has jurisdiction of "'the case.' But if the removal was not applied for "in time, this is not treated as an unimportant irreg- "ularity, and the uniform practice is to remand the "case. This objection, however, must be made sea- "sonably, or it will be deemed waived."

In connection with the foregoing text, Judge Dillon refers to Burdick v. Hale, 8 Chicago Legal News, 192, in which Judge Gresham seems to have taken a different view, and held that the want of a penal sum in the bond, and the want of a direct stipulation to pay costs in case of a remanding, were grounds for the remanding. A look at Judge Gresham's opinion shows that he regarded all of the provisions of section 3, Act of 1875, as jurisdictional. Upon this view he bases his holding. Judge Dillon evidently disagrees with him. The cause in which Judge Drummond gave the construction, Judge Dillon refers to is Osgood v. Chicago et al. R. R. Co., 2d Central Law Journal, 275, and on reargument, same 283, and in 6th Bissell, 330, the language of the syllabus is:

"If the record is filed in the Federal Court, and "the Court can see that it involves a controversy

"within its jurisdiction, it will retain jurisdiction, not-
"withstanding there may have been irregularities in
"the mode of procuring the removal."

In the opinion on page 226, the language is:
"The fifth section (of the Act of March 3d, 1875,)
"was intended to protect a party in case of the im-
"proper removal of a suit from the State to the Fed-
"eral Court, but the language of that section is pe-
"culiarly significant as affecting the motion (to dis-
"miss or remand) now before the Court."

"The copy of the record has been filed in this
"Court, and the law seems to indicate under what
"circumstances only in such an event the case should
"be remanded back to the State Court. *It is when*
"*it shall* appear, to the satisfaction of the Federal
"Court, that the suit does not really and substan-
"tially involve a dispute or controversy properly
"within the jurisdiction of the Court, or that the
"parties have been improperly or collusively made
"or joined for the purpose of creating a case cogniza-
"ble under the Act. It is true the Act prescribes
"the manner in which the removal shall be made,
"and the directions of the law shall (should?) be
"complied with. But the fifth section does not
"authorize the Court to remand the cause, for the
"reason that it may appear that there was any irreg-
"ularity in any of the means taken to procure the
"removal. The purpose obviously was, if the record
"was filed in the Federal Court, under the law, and
"the Court could see that it had jurisdiction of the
"case, (by reason of citizenship or subject matter,)

"it should retain it, notwithstanding there might be "defects in the manner of removal."

In addition to the foregoing opinions of Judges Dillon and Drummond, on the right and propriety of supplying any defect and curing any irregularity in the removal, I will cite the language of Justice Grier in Parker v. Overman, 18th Howard, 137–141:

"In the petition to remove this case from the State "Court, there was not a proper averment as to the "citizenship of the plaintiff in error. It was alleged "that Parker *resided* in Tennessee and White in "Maryland. 'Citizenship' and 'residence' are not "synonymous terms; *but, as the record was after-* "*wards so amended as to show conclusively the citizen-* "*ship of the parties, the Court below had, and this* "*Court have undoubted jurisdiction of the case.*"

In French v. Hay, 22d Wallace, 238–244, an objection to the jurisdiction of the Circuit and Supreme Courts in a removal case was passed upon by the Supreme Court of the United States in the following language in the syllabus:

"When a case has been removed from a State "Court into the Circuit Court of the United States, "under one of the Acts of Congress relating to such "removal of cases, (in this case the Act was that of "March 2d, 1867,) an objection that the Act has not "been complied with in respect of time and other "important particulars, will not be listened to in this "Court, the point not having been made in the Court "below until three years after the removal was

"made, and when the testimony was all taken, and "the case ready for hearing. Nor ought it under "such circumstances to have been listened to in the "Circuit Court. It came too late, and must be held "to have been conclusively waived."

We will venture to ask of the counsel on the other side of this motion, and also of this Court, if the objections went to the jurisdiction of the Court, could they be "*conclusively waived?*" Can the Court acquire jurisdiction in that way?

We have not failed to notice what language is used by the Court in the case of McMurdy v. The Connecticut General Life Insurance Co., 4th Weekly Notes of Cases, 187, viz: "If the required bond has "not been filed this Court has no jurisdiction." We must think, however, that this is not in harmony with the true construction of the statute, nor with the holdings of this Court heretofore cited, in 18th How. 137–141, and 22d Wallace, 238–244. In any proper sense of the word, "jurisdiction," as here used, is in fact predicable only of the subject matter in controversy, and of the citizenship of the parties. Upon these rests the jurisdiction of the Court. That jurisdiction may be invoked in either one of two ways, to-wit: by suit originally begun in, or by removal from a State Court to the United States Court. All else than subject matter and citizenship, in originally begun and remanded causes alike, is procedure, and nothing more; and so this Court held in 18 How. and 22d Wall., *supra*. Defects and irregularities may be cured; may be waived; may

be amended. While an appeal bond may be irregular in form, yet it may be sufficient to remove a cause to an Appellate Court. Such irregularity may be covered by an amendment. In 6th O. S. Rep., 81, Irwin v. Bank of Bellefontaine, a defective appeal bond, so defective that on page 89, the court pronounced it "not a bond, but rather a "covenant in the nature of a guaranty." Yet, this was held sufficient to allow the Appellate Court to entertain the case, and the defective bond made good by an amendment to the bond in accordance with the statute. It, in that case, was held to be a proceeding, and the proceeding that carried the case from one court to another. In this removal, the most that can be said of the importance of the bond, is that it is an incident to the main instrument in the procedure, the petition for removal. In the petition, and in the record, do we find the jurisdictional facts, and not in the bond. The bond is designed *alone* for the protection of the opposite party and the officers who may earn costs. Its existence, or non-existence, in no wise affects the jurisdiction of the Court. The want of it could be waived by the beneficiaries under the bond, and the fullness of the jurisdiction remain unimpaired. This is true, that the United States Court might refuse, in justice to the opposite party, and the officers who may earn costs, to proceed with the cause if the bond is defective, until the defect has been cured; and if, after a reasonable time has elapsed in which to cure the defect, it is not done, the cause might be remanded for that reason. We can

not understand the meaning of the language, that a bond is "fatally defective," because, while it contains the important conditions, it lacks only the obligation to pay the costs of the removal and remanding, if the case ought not to have been removed.

In the case of Baker v. Peterson, 4th Dillon, 562, 3, Judges Dillon and Love, sitting, it was held "That although the condition of the bond for the "removal was in conformity with the Act of July "27th, 1866, and omitted the condition required by "the Act of March 3d, 1875, as to paying costs that "may be awarded by the Circuit Court for a wrong-"ful or improper removal thereto; yet, as the case "was one proper for removal, and the bond had been "accepted by the State Court, and the record was "filed and the appearance of the plaintiff in the Cir-"cuit Court entered in time, the omitted clause in "the condition of the bond was not sufficient ground "for remanding the suit to the State Court."

In each and all of the points and conditions as to the acts of removal and the giving of bond, enumerated last above, is there full compliance by Babbitt. (See printed Record 39 and 40, and for original and additional bond, see pages 38, 39, 41 and 42.) The Circuit Court finds on page 43, paragraph "sixth," that on the 17th of September, 1879, an additional transcript was filed, showing the giving of the additional bond, and that the surety on each of the bonds given was sufficient.

On the contrary, Judge Blatchford seems to have

followed the ruling in McMurdy v. C. G. L. Ins. Co., 9, Chicago Legal News, 324. Thus it is that we find the Circuit Court, when held by the Circuit Judges, in the Seventh and Eighth Circuits, holding this defect in the bond, not "fatally defective," not ground for remanding, while we find the same courts, in the Second and Third Circuits, holding the opposite. With these courts thus opposed, so far as the weight of authority is concerned, we look to this court in 18th How. and 22d Wall., *supra*.

There was a mistake in drafting the original bond, by the draftsman using the wrong form, in Dillon on "Removal of Causes." On page 83, is the form that was used. On pages 86 and 87, is the form that is given under the Act of March 3d, 1875. As hereinbefore stated, the petition for removal states that the petitioner presents a bond, with his petition, "with good and sufficient surety, for his entering in "said Circuit Court of the United States, on the first "day of its next session, a copy of the record in this "suit, and for paying all costs that may be awarded "by said Circuit Court, if said court shall hold that "this suit was wrongfully or improperly removed "thereto." This evinces a knowledge as to the proper kind of bond, and an intention to frame it in accordance with the wording of the statute. Such a mistake it would seem ought not to defeat the standing of the defendant in the United States Court, especially when the defect has been remedied before the motion to remand has been heard. The record shows that the remanding order was not based on the irreg-

ularity in the bond, but solely on the time petition for removal was filed.

RECAPITULATION.

I.—MOTION TO DISMISS APPEAL.

a. The whole record of the case, in both State and Circuit Court, is before this Court, with exception by defendant, in the record to the order to remand.

b. The review in this Court may be had, either on error or appeal, as the whole record is before this Court.

c. It is not necessary to such review that there be a final judgment or order in the case.

d. Such review, of orders remanding cases, is not limited to cases involving $5,000, or upwards, but covers any case that may be removed.

II.—TIME OF FILING PETITION FOR REMOVAL.

a. "The first term at which a cause can be tried, is "the first term at which there is an issue for trial."

b. The statutory provision that a cause shall be triable at any particular time, does not change the

foregoing rule, when applied to the third section of the Act of March 3d, 1873.

c. The filing in the Clerk's office, of a pleading, which makes up an issue, out of rule, without leave, and without the consent of, or notice to, the adverse party, cannot take effect, as to time such issue is made up until notice is had thereof by the adverse party.

d. In this case, the answer of the defendant called for a reply, from the plaintiffs, to make up the issues as they stand.

III.—SUFFICIENCY OF BOND.

a. The bond, under the removal Act of March 3d, 1875, is only an incident to the petition for removal, and does not go to the jurisdiction of the Circuit Court, to which the cause is sought to be removed.

b. The bond is required only for the protection of the adverse party and the officers of the Court, who may earn costs in the case.

c. The bond, if irregular or defective, may be amended or supplemented by another, and when the original and supplemental or additional bond fulfil the requirements of the statute, the cause should not be remanded, on account of such defect in the original bond.

IV.—GROUND OF REMOVAL.

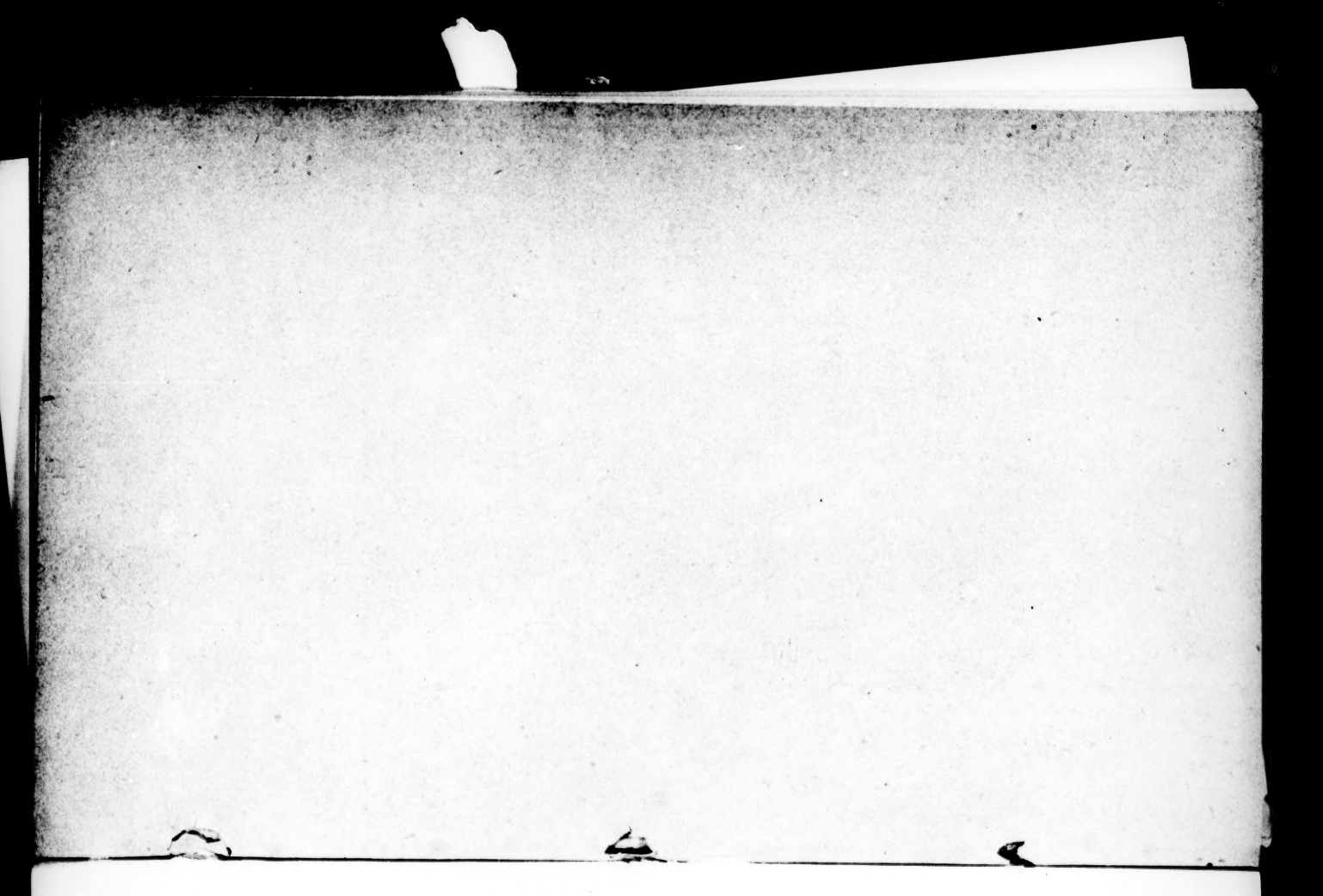
—There is in the case a question arising under the laws of the United States, to-wit.: the Bankrupt Acts.

We do not claim any right of removal on the ground of citizenship.

We ask the reversal of the remanding order.

JOHN C. LEE,

Attorney for Appellant



JAN 4 1881

Supreme Court of United States

OCTOBER TERM, 1880.

ALBERT T. BABBITT.

Appellant,

vs.

PARKER P. CLARK. ET. AL.,

Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

ARGUMENT FOR APPELLEES.

ISAAC P. PUGSLEY,

Attorney.

TOLEDO TELEGRAM PRINT.

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ARGUMENT FOR APPELLEES.

I.

MOTION TO DISMISS APPEAL.

On Octobor 25th, 1878, the appellees, Parker P. Clark and others, commenced an action against the appellant, Albert T. Babbitt, in the Court of Common Pleas of Lucas County, Ohio, on a judgment theretofore recovered by said appellees against said appellant in the Court of Common Pleas of the City of New York, the same being an ordinary action at law for a money demand on said judgment. The amount claimed in the petition in said action is $1,518.49, and interest at 7 per cent. per annum from October 1st, 1878. On May 17th, 1879, appellant filed a petition in the said Court of Common Pleas of Lucas County, praying for the removal of said action to

the Circuit Court of the United States for the Western Division of the Northern District of Ohio, which petition was granted by the said Court of Common Pleas.

On June 5th, 1879, a copy of the record in said action was filed in said Circuit Court.

On December 20th, 1879, on motion of the appellees the said Circuit Court remanded the said action to the said Court of Common Pleas on the ground that the petition for removal was not filed in time, and from the order so remanding said action this appeal has been taken.

The appellees have filed in this Court a motion to dismiss said appeal on the ground that the Court has no jurisdiction to review the said order, and by stipulation between counsel, this motion is to be submitted to the Court at the same time with the questions raised by the appeal.

The grounds upon which the appellees claim that the Court has no jurisdiction to review the order appealed from are the following:

First—The order is not a final judgment or decree in the sense which authorizes a writ of error or appeal.

Second—The amount in dispute is less than the amount necessary to give this Court jurisdiction.

Third—The order is not reviewable by appeal.

FIRST.

The order is not a final judgment or decree in the sense which authorizes a writ of error or appeal.

This has been expressly decided by this Court.

R. R. Co. vs. Wiswall, 23 Wallace, 507.

Since said decision the Act of March 3rd, 1875, has been passed. And under the 5th section of said Act, it

is claimed that authority is conferred upon this Court to review the said order.

Said Section is as follows:

SEC. 5, That if, in any suit commenced in a Circuit Court or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought or removed thereto, *that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act,* the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said Circuit Court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

Without this section, it must be conceded, an order remanding a cause to the State Court could not in any case be reviewed by the Supreme Court.

The question then is presented, what orders of the Circuit Court remanding a cause to the State Court are under said section 5, reviewable by the Supreme Court?

Clearly they are only orders remanding a cause for the reasons mentioned in said section, namely, that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, or that the parties to said suit have been improperly or collusively made or joined.

The language of the section is "the order of said Circuit Court remanding *said* cause shall be reviewable."

"Said" cause is the cause mentioned in the preceding clauses of the section, that is, a cause removed to the Federal Court, and remanded for the reasons there stated, and "the order" remanding said cause is the order previously defined in said section.

But there are numerous cases not mentioned in said section 5, in which the Circuit Court will remand a cause to the State Court on motion seasonably made, and such was the uniform practice prior to the Act of March 3rd, 1875.—*Dillon on Removal of Causes, page* 72.

We mention some of such cases:

When the petition for removal is not filed in the State Court in time.

When no bond is filed with the petition as required by law.

When the copy of the record has not been filed in the Circuit Court in due time.

When the petitioner for removal has failed to comply with any substantial condition attached by law to the right of removal.

In each of these cases the Circuit Court may have full jurisdiction by reason of the citizenship of the parties, or the subject matter of the litigation, and yet it will remand the cause to the State Court, not by virtue of any authority conferred by said section 5, but because the petitioner for removal has not done what the law requires him to do, to get his cause removed.

The jurisdiction of a State Court over a controversy rightfully in its possession cannot be dislodged except by fully complying with the requirements of the Acts of Congress.

Burdick vs. Hale, 7 Bissell, 96.

The provisions of section 5 of Act of March 3, 1875, are enabling and not prohibitory, and they are not such as to indicate any intention in Congress to take away from the Circuit Court the power of remanding a cause to the State Court on the ground that the prescribed prerequisites to authorize the Circuit Court to proceed have not been complied with.

McLean vs. R. R. Co., 16 Blatchford, 309.

In these cases cited no question as to the jurisdiction of the Circuit Court over the matter in dispute, or as to the joinder of parties is involved, and therefore, we claim, the order remanding such a case is not provided for in the last clause of said section 5.

In this case the motion to remand was made on the grounds that the petition for removal was not filed in time and that the bond for removal was defective, and also on the ground, it is true, that the subject matter of the litigation and the citizenship of the parties were not such as to give the Circuit Court jurisdiction. The Court found that the petition for removal was not filed in time, and for that reason alone remanded the cause. There was no finding that the controversy in the cause was not within the jurisdiction of the Court, nor that the parties were improperly made or joined.—*Record*, page 43.

The character and effect of the order, as to the matter we are now considering, are precisely the same as if no other ground for the motion to remand was alleged than the one upon which the order was based, or as if all the other grounds were untenable.

The language of said section 5 is that if it shall appear that "the suit does not really and substantially involve a dispute or controversy *properly* within the juris-

diction of said Circuit Court, &c.," the suit shall be dismissed or remanded.

Counsel for appellant claims that the word "properly" refers to the manner of bringing the suit into the Federal Court, and argues that provision is thus made for remanding a cause when the proper steps to cause its removal have not been taken.

But it will be noticed that in said section 5 the same provision is made both for suits *commenced* in the Circuit Court and suits removed thereto from the State Court, and that by said section it is made the duty of the Circuit Court to dismiss a suit commenced therein, when it does not involve a controversy *properly* within the jurisdiction of said Circuit Court.

The word "properly" is used in connection with both classes of suits, and cannot therefore have the meaning which counsel claim. In our view, it means simply "according to law," or "as defined by law," and might be omitted without altering the sense of the statute.

As the Act of March 3d, 1875, was passed so soon after the decision of *R. R. Co. vs. Wiswall*, 23 Wallace, 507, it is no doubt true that the section of said Act providing for a review of the remanding order was suggested by that decision.

An examination of the decision shows that in that case the cause was remanded by the Circuit Court on the ground that it had no jurisdiction, and the order so remanding said cause this Court held could not be reviewed on error.

To provide a review in such cases was the object of the Act, and from the very careful language used in mentioning only some of the grounds for which a cause may

be remanded, it is evident that Congress did not intend to provide a review in any other cases.

The reasons which would impel Congress to pass a law allowing the review of an order remanding a cause based on a want of jurisdiction in the Circuit Court, have no application to an order remanding a cause, simply because the proceedings for removal are not in compliance with the law.

It is clear, it seems to us, that the order appealed from in this case, is not one which by said section 5 is reviewable by this Court.

SECOND.

We claim that if an order remanding a cause for the reason that the petition for removal is not filed in time, is reviewable in any case, this order is not reviewable, because the matter in dispute is less than the sum necessary to give this Court jurisdiction.

The amount in dispute is $1,518.49 and interest from October 1st, 1878.

At the time of the passage of the Act of March 3rd, 1875, sections 691, 692 and 699 of the Revised Statutes were in force.

By Section 691, all final judgments of the Circuit Court in civil actions, when the matter in dispute exclusive of costs, exceeds the sum or value of $2,000.00, may be re-examined in the Supreme Court on a writ of error.

By Section 692, an appeal shall be allowed to the Supreme Court from all final decrees of the Circuit Court in cases of equity, and of admiralty and maritime jurisdiction, when the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000.00.

By Section 699, a writ of error may be allowed to review a final judgment at law, and an appeal shall be

allowed from a final decree in equity *without regard to the sum or value in dispute* in 5 classes of cases, enumerating them.

On February 16th, 1875, Congress passed an Act to take effect May 1st, 1875, and the same is still in force. By section 3 of said Act it is provided that whenever by the laws now in force, it is required that the matter in dispute shall exceed $2,000.00, in order that the judgments and decrees of the Circuit Court may be re-examined in the Supreme Court, such judgments and decrees shall not be re-examined in Supreme Court unless the matter in dispute exceeds the sum of $5,000.

The Act of March 3d, 1875, is silent as to the amount necessary to give this Court jurisdiction.

Our opponents would construe the Act as if the words "without regard to the amount or value in dispute" were inserted, as in Sec. 699 of Revised Statutes.

In view of the legislation in force at the time of the passage of the Act, and in view of the Act passed February 16th, 1875, to take effect May 1, 1875, we claim that if Congress had intended to allow orders remanding a cause to be reviewed by this Court without regard to the amount in dispute, it would have so provided.

By omitting to so provide, Congress clearly intended that the provisions of the Statutes as to review of the final judgments and decrees of the Circuit Court should apply to such orders.

It must be borne in mind that the only provision for reviewing such orders is contained in said section 5.

The language is "the order shall be reviewable by writ of error or appeal, *as the case may be.*"

How are the proceedings on error or appeal to be conducted?

What steps are necessary to be taken by the appellant or plaintiff in error to secure a review of the order?

Clearly it must be in the same manner and under the same restrictions that a writ of error or appeal is prosecuted to review final judgments or decrees, as there are no other provisions on the subject.

If it is an action at law and the final judgment therein could be reviewed in this Court upon a writ of error, then in the same manner and under the same circumstances, the order remanding the cause can be reviewed.

If on the other hand it is a case of equity in which the final decree could be reviewed in this Court by appeal, then in the same manner and under the same circumstances the order remanding the cause can be reviewed.

The order is not reviewable by writ of error or appeal in all cases, but only "*as the case may be.*"

That is, if the case is one for error to this Court, then error will lie to the order. If it is one for appeal, then the order is appealable.

But this case is not a proper one for either error or appeal, because the amount in dispute is insufficient, and therefore the order cannot be reviewed in either mode.

If our motion to remand had been improperly overruled by the Circuit Court, there is no way provided by law whereby the error could be corrected.

We do not believe that Congress contemplated any such incongruity in legislation.

Before the Act of March 3d, 1875, in a case within the jurisdiction of this Court, an order overruling a motion to remand could be reviewed, when the case was brought here, and for error in overruling the motion, the judgment of the Court would be reversed, but under the

same circumstances an order granting the motion to remand could not be reviewed.

We contend that the sole purpose of section 5 of the Act of March 3rd, 1875, was to put the parties on an equal footing, and permit the review of an order remanding a cause whenever under the same circumstances an order refusing to remand could be reviewed, and not otherwise.

By this construction of the Act, the letter and spirit are alike preserved, and all the legislation on the subject harmonized.

THIRD.

If the order is reviewable at all, it must be by writ of error and not appeal.

The cause is one in which the final judgment can be brought here, if at all, only by writ of error, and so the order can be reviewed in no other way.

We do not care to press this point, and make it simply to preserve the consistency of our argument and that we may not by our silence be understood as admitting the regularity of appellant's proceedings.

Since the passage of the Act of March 3d, 1875, two cases have been decided by this Court involving questions arising under the last clause of the 5th section of said Act.

Hoadley vs. San Francisco, 94 U. S., 4.

Ayers vs. Chicago, 101 U. S., 184.

Each case was an appeal from the order of the Circuit Court remanding a cause to the State Court, and in each case the order was held to be reviewable by this Court on appeal.

We do not understand that the views we have expressed herein are inconsistent with either of these decisions.

In *Hoadley vs. San Francisco* an action was brought in the State Court to quiet title to certain real estate, a case in equity, and the action was removed to the United States Circuit Court on the ground that it was one arising under the Constitution and Laws of the United States.

The Circuit Court remanded the cause to the State Court on the ground that it was not a suit arising under the Constitution and Laws of the United States.

It does not appear in the report what was the amount or value of the matter in dispute, nor does it appear that any defect was claimed to exist in the steps taken to remove the cause.

On the other hand the only question that appears to have been raised in any of the Courts on the subject of removal, was whether the suit was one arising under the Constitution and Laws of the United States.

The Circuit Court decided that question in the negative and remanded the cause.

The order remanding the cause is clearly within said section 5.

In *Ayers vs. Chicago*, the controversy arose on a cross-bill filed in the State Court to subject real estate to the payment of a judgment, also a case in equity.

The case was removed to the Circuit Court, and by that Court was remanded to the State Court on the ground that the controversy was not between citizens of different States.

From the order remanding the cause an appeal was taken to this Court and a motion was made here to dismiss the appeal.

The Court held that under section 5, of the Act of March 3rd, 1875, it had jurisdiction to review the order.

In this case also the order appealed from, is clearly within said section 5.

None of the questions which we raise here were presented or decided, or necessarily involved in either of these decisions.

We do not suppose that in either case the Court intended to decide anything further than that the order appealed from *in that case* is reviewable by this Court under said section 5.

The Circuit Court always had the power, and in practice frequently exercised it, even before the Act of March 3rd, 1875, to remand a cause, when it appeared that it had no jurisdiction over the controversy.

Why then did Congress designate this as a ground for remanding a cause and omit the other grounds, unless it was to thus describe the character of the remanding order, which might be reviewed?

If it were otherwise, the first clause of section 5 would have been made broad enough to include all the grounds for which a cause may be remanded or would have been omitted entirely.

We maintain therefore, that Congress intended to limit the review by this Court to orders remanding a cause for want of jurisdiction over the controversy.

We have under rule 6, united with the motion to dismiss the appeal, a motion to affirm the order.

This will involve an examination of the record.

The Court will under rule 6 as amended, affirm the judgment of the Court below, although denying the motion to dismiss the appeal, when the judgment of the

Court below is so clearly right that the Court are not inclined to hear an argument on the question.

Moore vs. Simonds, 100 U. S., 146.

In view of the stipulation between counsel submitting this cause to the Court under Rule 20, the motion to affirm is perhaps immaterial.

If the Court shall be of the opinion that the order appealed from is reviewable, we then ask consideration of the following argument upon the questions raised by the appeal.

II.

QUESTIONS RAISED BY THE APPEAL.

Did the Circuit Court err in remanding this cause to the State Court?

The grounds on which the motion to remand was based, may be summarized as follows:

1st, The suit does not involve a controversy within the jurisdiction of the Circuit Court because,

(*a*) The controversy is not between citizens of different states.

(*b*) The suit does not arise under any law of the United States.

2nd. The petition for removal was not filed in the State Court before or at the term of said State Court at which said suit could have been first tried.

3rd. The bond filed in said State Court at the time of filing the petition for removal is defective, in that it does not provide as required by law for paying all costs that may be awarded by the Circuit Court, if said Court shall hold that said suit was improperly removed thereto,—*Record*, page 40.

The Circuit Court ordered the cause remanded on the

ground that the petition for removal was not filed in time.—*Record*, page 43.

If the record shows that the cause was properly remanded *for any reason*, then the order should be affirmed.

It will be necessary therefore to consider all the alleged grounds for remanding the cause.

FIRST.

The suit does not involve a controversy within the jurisdiction of the Circuit Court, because,

(*a*) The controversy is not between citizens of different states.

(*b*) The suit does not arise under any law of the United States.

The petition for removal was filed under the Act of March 3d, 1875, and the grounds on which it was alleged that the cause was removable, were that the controversy in the suit is between citizens of different states, and that the suit arises under a law of the United States, to-wit, the Bankrupt Law.—*Record*, pages 37 and 38.

(*a*)

The controversy is not between citizens of different states.

At the time of filing the petition for removal the plaintiffs (appellees) were citizens of the State of New York, and the defendant (appellant) was a citizen of the *Territory* of Wyoming.—*Record*, page 37.

Section 2, of the Act of March 3rd, 1875, provides that "any suit of a civil nature, at law or in equity * * * in which there shall be a controversy between citizens of different states, may be removed, etc.," thus using the

language of Section 2, Article 3 of the Constitution of the United States, which defines and limits the judicial power of the general government.

At an early day it was decided by this Court that the District of Columbia is not "a State" within the meaning of that term as used in the Constitution, and that its citizens cannot sue in the Courts of the United States as citizens of any State.

Hepburn vs. Ellzey, 2 Cranch, 445.

Subsequently this Court held that there is no distinction in this respect between the District of Columbia and a Territory, and that a Territory is not a State in the sense in which that term is used in the Constitution.

New Orleans vs. Winter, 1 Wheaton, 91.

(*b*)

The suit does not arise under any law of the United States.

The action is upon a judgment rendered by a State Court having jurisdiction of the subject and of the parties.

The answer sets up certain composition proceedings in Bankruptcy had by the defendant Babbitt whereby it is claimed that the plaintiffs' debt was discharged.—*Record*, pages 30, 31, 32 and 33.

The reply and amendment to reply take no issue upon the facts of the composition or its effect, but allege in substance that all the matters set out in the defendant's answer, were before the Court in the original action in which the judgment was rendered, and that therefore it is *res adjudicata*.—*Record*, pages 33, 34, 35 and 36.

Upon these pleadings it is claimed by appellant, that the suit arises under the Bankrupt Law.

On the other hand, we claim that no question is raised

as to the validity or effect of the Bankrupt Law, or calling for a construction of that Law, but that the rights of the parties depend solely upon general principles of law.

This Court has held that to authorize the removal of a cause from a State Court on the ground that it arises under the Constitution or Laws of the United States, the suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or Laws upon the facts involved. The suit cannot be removed simply because in its progress a construction of a Law of the United States may be necessary. The decision of the case must depend upon the construction to be given to the Constitution or Laws.

Gold Washing Co. vs. Keyes, 96 U. S., 199.

The Circuit Court of the United States for the Northern District of Illinois, in a case decided in December, 1879, held that to authorize the removal of a cause, it must clearly appear from the record, when all inspected together, that a federal question is presented and must necessarily be passed upon in the disposition of the case.

Wilder vs. Bank, Vol. 9 "*Reporter*," page 3.

Here there is no controversy as to the construction of the Bankrupt Law, and no question involved as to the meaning or effect of any provision of that Law.

If upon trial the plaintiffs should fail to prove the allegations of their reply, then as there is no denial of the composition proceedings set out in the answer, the defendant would be entitled to judgment, as upon default for reply, and no question is raised as to the effect of the composition or calling for a construction of the Bankrupt Law.

If on the other hand, upon trial the plaintiffs should

prove the allegations of their reply, the only question would be whether this was not *res adjudicata*. The construction of the Bankrupt Law would not be involved.

Our claim is, that the defendant having had an opportunity to submit his defense in the State Court, or much more in this case having actually done so, he is bound by the judgment of that Court, no matter how erroneous, until it is reversed. And in an action upon that judgment he cannot go behind it and set up what might have been a good defense to the original action. This is but a proposition of elementary law, dependent upon the construction of no statute whatever.

No question of fraud as against the defendant's discharge in Bankruptcy is raised. The simple question is, whether by the judgment the defendant is estopped from relitigating the matters set out in his answer.

But it is said that after having obtained their judgment, which we say they could have enforced, the plaintiffs took from the register the deposited composition money. Peradventure they took money which did not belong to them, but supposing it is claimed, that the taking of this money operated as a satisfaction of the judgment. Why did it so operate? Not because it was a deposit in Bankruptcy proceedings, but because it was deposited upon condition of the extinguishment of the original claim and the plaintiffs could take it only upon that condition. This question would be one of general law, and would call for no construction of the Bankrupt Law. There is no provision of the Bankrupt Law on the subject. Suppose they had taken it before judgment, it would clearly have extinguished their claim, but if they had still gone on and obtained judgment, it would be

final between the parties. So when they obtained their judgment, the effect of the bankruptcy proceedings as a defense was at an end and what was done afterwards raises no question under a law of the United States.

Under the authorities cited, the decision of this case, as presented by the record, does not depend upon the construction of the Bankrupt Law.

The language of section 2 of the Act is, "any *suit* * * * arising under the Constitution or Laws of the United States * * * either party may remove, etc."

By this Act for the first time Congress authorized the removal of a suit from a State to a Federal Court, on the ground that it is one arising under the Constitution or Laws of the United States.

This suit is upon a judgment of the State Court in which no right grows out of and no claim is made under any Law of the United States.

Assuming that the *defense to the suit* made by the answer is one arising under a law of the United States, and that an answer making such a defense standing by itself presents a removable case within the meaning of the Act, of which there seems to be some question, we still claim that the *suit* does not arise under such law, unless it satisfactorily appears from an inspection of the whole record that the decision of *that suit* must necessarily depend upon the construction of that law.

SECOND.

The petition for removal was not filed in time.

"He or they may make and file a petition in such suit in such State Court *before or at* the term at which *said cause could be first tried* and before the trial thereof."—Act of March 3d, 1875, Sec, 3.

The word "term" as here used means, according to the construction which it has received in the 8th Judicial Circuit, the term at which, *under the legislation of the State and the rules of practice pursuant thereto* the cause is *first triable, i. e.*, subject to be tried on its merits: not necessarily the term when, owing to press of business or arrearages, it may be first reached in its order for actual trial.—*Dillon on removal of Causes, page* 57.

The legislation of Ohio is as follows: "Actions are triable at the first term of the Court after the issues therein *by the times fixed for pleading* are or *should have been made up*; and when the issues are or *should have been made up during a term*, such actions shall be triable *at that term.*"—*Ohio Laws of* 1878, page 630, Sec. 9, (*Ohio Code*, Sec. 308.) Same provision in *Vol.* 2, *Ohio Rev. Stat.*, page 1252, Sec 5135.

"The answer shall be filed on or before the 3d Saturday, and the reply on or before the 5th Saturday after the return day of the summons."—*Ohio Laws of* 1878, page 624, Sec. 41, (*Ohio Code*, Sec. 103.) Same provision in Vol. 2, *Ohio Rev. Stat.*, page 1244, Sec. 5097.

In this case the return day of the summons was Monday, Decemher 16th, 1878.

The rule day for answer was January 4th, 1879.

On this day the answer was filed.

The rule day for reply was January 18th, 1879.

The reply was filed April 3d, 1879.

The January Term, 1879, began January 2d, 1879, and ended April 7th, 1879.

This case was therefore *triable* at the January Term, 1879, and at any time after January 18th, 1879, and the petition for removal not having been filed until the next term, to-wit, on May 17, 1879, was too late.

All the Courts which have construed the above quoted clause in Section 3 of the Act of March 3d, 1875, while regretting that the language of the Statute is not more definite, agree that the rules of practice of the State in which the cause is pending must govern as to the term when the cause is first triable, and so as to the time within which the petition for removal must be filed.

As these rules vary in the different States, it follows that no construction can be given to this Statute that shall have a general application. On this subject, therefore, it will be of little advantage to consider authorities except so far as the reasoning of the Court is applicable to the Ohio practice.

The sense of the above quoted provisions of the Ohio Code is so clear, that there would seem to be no room for argument. Under these provisions there can be no doubt that this cause was triable at the January Term, 1879, as at this Term by the times fixed for pleading the *issues should have been made up.*

The following authorities are applicable:

Atlee vs. Potter, 4 Dillon. 559.

Murray vs. Holden, Vol. 10 *The Reporter*, 162.

Atlee vs. Potter was a case in the Circuit Court of the United States for the District of Iowa. A petition for removal was filed in a State Court of Iowa not at the return term nor at the next term when the defendants entered their appearance, nor at the next succeeding term, but at the term at which the answer was filed and issues of fact completed. The Code of Iowa provides that law actions shall be tried at the "first term after legal and timely service has been made." The Court held (Dillon J. delivering the opinion) that the time for removal cannot be extended by the circumstance that in

point of fact the issues are not made up, and because the petition for removal was not filed in time, remanded the cause.

Murray vs. Holden was a case in the Circuit Court of the United States for the Western District of Missouri. An action was brought in a State Court of Missouri to the September Term, 1878, and could have been tried at that term, if the issues had been joined. At that term a demurrer was interposed by defendants which was argued and at the March Term, 1879, was overruled. The defendants then filed their petition for removal to the United States Circuit Court. On motion by plaintiff to remand, the Circuit Court held (McCrary J. delivering the opinion) "that the term at or before which a cause is removable to the Federal Court is the term at which by law it is subject to be tried on its merits. The statute does not contemplate any delay for the purpose of settling the pleadings in the State Court. In practice but few contested cases are tried at the first trial term, and it often happens that controversies arise upon questions of pleading, so that, as in this case, no issues of fact are joined at that term. It is, nevertheless, the term at which within the meaning of the law such cases could first be tried, and therefore is the term at or before which the petition for removal must be filed," and for the reason that the petition for removal was not filed in time, the motion to remand was sustained.

We cite also on this point

Ames vs. Colorado R. R. Co., 4 Dillon, 263.

Buskirk Indiana Practice, 459.

Fulton vs. Golden, Vol. 8 *The Reporter*, 517.

Counsel for appellant refers to the following authori-

ties as holding that a petition for removal need not be filed until the first term after the issues are made up:

Gurnee vs. Brunswick, 1 Hughes, 271.

Scott vs. R. R. Co., 6 Bissell, 529.

Pettillon vs. Noble, 7 Bissell, 449.

Warner vs. Penn. R. R. Co., 13 N. Y. Sup. Court (6 Hun) 197.

Gurnee vs. Brunswick, was a case in Virginia. The plaintiff filed a claim with a County Board of Supervisors and from the order of the Board disallowing his claim he appealed to the County Court. His papers were duly filed in the County Court, and on February 22nd, 1875, under the local practice, the case was removed to the Circuit Court of the County. Two terms of this Court passed and on April 13th, 1876, no pleadings in form having been filed by either party, the plaintiff filed a petition for the removal of the case to the United States Circuit Court, and in the latter Court the case was in due time docketed. On motion to remand to the State Court for the reason that the petition for removal was not filed in time, the Court held (Chief Justice Waite delivering the opinion) that under the Virginia practice an appeal to the County or Circuit Court of the State, from a decision of the Board of Supervisors disallowing a claim against the County, is *triable at the first term of the Court after the appeal is taken, without pleadings*, and an application to remove the cause to the United States Court under the Act of March 3rd, 1875, *must be made at that term.* The motion to remand was sustained.

This is an authority in our favor. Here was a case in which under the practice of the State *without pleadings*, the issue was made up and the cause was ready for trial

at the first term at which the case was docketed in the State Court, and *at this term* the petition for removal should have been filed. In the language of the opinion, the parties and the Court may not be ready for trial at that term, but the cause is.

Scott vs. R. R. Co., was a chancery case in Illinois. Without reviewing the facts of this case, it is sufficient to say that at the time the application for removal was made, no answer had been filed, and under the chancery practice of *that State*, there was no issue for trial. In other words, under the State practice the cause was not triable. Judge Drummond says, (page 536.) "It will be observed that the language of the Statute (section 3 of Act of March 3d, 1875,) is more especially applicable literally to the trial of a case at law, and it is often a matter of difficulty to determine what is the first term at which a chancery cause can be tried or heard."

Pettillon vs. Noble, was also a chancery case in Illinois. The decree of the State Court dismissing the bill was appealed from by the complainants, to the State Supreme Court prior to the Act of March 3d, 1875, and by that Court was reversed. The case was re-docketed in the State Court on November 3d. 1876, and the defendants then applied for removal to the United States Court. On motion to remand, the Court held that a case pending in the State Supreme Court at the time of the passage of the Act of March 3d, 1875, and remanded for further proceedings, stands like a new case, that not having been re-docketed in the State Court until November 3d, 1876, it stood as if it first appeared on the docket of the State Court on that day, and that therefore the petition for removal was in time. It was not a suit in the State Court within the meaning of section 2 of the Act of

March 3d, 1875, until it was properly re-docketed therein and a petition for removal filed at the first term thereafter at which it could be tried, was in time.

Warner vs. Penn. R. R. Co. was a case in New York pending and at issue when the Act of March 3d, 1875, was passed. It could have been tried at April Term, 1875. That is, it might have been noticed for trial and placed upon the calendar of the Court for that term. The petition for removal was not filed until the next term, to-wit, on May 12, 1875. The Court held that it was too late, and refused to remove the cause. The decision was, that a case pending and at issue when the Act of March 3d, 1875 went into effect, may be removed to the United States Court, but the petition for removal must be filed at the first term thereafter, a proposition upon which all authorities are agreed. There was nothing in the case to call for any ruling that the petition for removal need not be filed until the issue is made up and in fact there was no such ruling. The only language of the opinion that can possibly be so construed, is the following: "Any other construction than that requiring the application to be made before or at the first Court having authority to try the cause after issue has been joined, or in cases pending and at issue when the law went into effect, at the first Court afterward held, for which it could be noticed, would allow the applicant to delay it to the great detriment of his adversary." It will thus be seen in view of the case the Court was considering, that there is nothing in this language to sustain appellant's position. If by the practice of New York, a cause could be noticed for trial and placed on the calendar of the Court, before the issue is made up, or in other words, if the cause is triable *when the issue should*

be made up, as is the rule in Ohio, then what the Court say might be regarded as a *dictum* in appellant's favor. But as the practice in New York differs from ours, the case is in no sense as claimed, an authority.

Counsel for appellant cites a decision of Judge Swing in case of *Mich. Cent. R. R. Co. vs. Andes Ins. Co.*, reported in *Vol.* 9, *Chicago Legal News*, *page* 34.

In this case the Court held that the answer of the defendant required of the plaintiff a reply, and that until the issue was completed by the filing of a reply, no term can be held to have passed at which the cause could have been tried within the meaning of Sec. 3 of the Act of March 3d, 1875.

It will be noticed that the Judge makes no allusion to the plain and positive provisions of the Ohio Code above quoted, and which have been in force since 1853. Also that the only authority cited by him is *Scott vs. R. R. Co.*, upon which we have already commented.

The only other case that we are aware of in which this rule is held is *Phœnix Ins. Co. vs. Saettel*, 33 *Ohio State*, 278, decided by the Supreme Court Commission at its December Term, 1877.

This case stood on petition alone in a State Court holding monthly terms at the time of the passage of the Act of March 3d, 1875. The defendant never answered, but on May 26th, 1875, filed its petition for removal. The Court held that this was in time.

Judge Scott in delivering the opinion says that the proper meaning of the expression in the Statute "the term at which a cause can be first tried" is not free from doubt and resolves this doubt in favor of the construction which he gives to the Statute entirely upon the decisions

in *Gurnee vs. Brunswick, Scott vs. R. R. Co., Warner vs. Penn. R. R. Co. supra.*

We have already commented on these cases, and cannot but believe that *Gurnee vs. Brunswick and Warner vs. Penn. R. R. Co.* are authorities for holding that this petition for removal should have been filed at the April Term, 1875.

No allusion is made in the opinion to the Ohio practice as regulated by above quoted provisions of the Code, and we do not know therefore whether this important element in the case was presented or considered.

We may add that upon this point the Court were not unanimous. The Judge says (page 282) "*a majority of the Court* approve and are disposed to follow these authorities (viz., the three above cited) *especially as they have found no reported case in which the clause in question has been construed otherwise.*"

We concede that in a State where by law causes are not triable until the pleadings are all in and the issues are actually made up, the "term at which the cause could be first tried" is as counsel for appellant claims it, and also the rule might be different as Judge Dillon says in *Atlee vs. Potter supra*, in the absence of statutory regulation as to what shall be the trial term. But the legislation of Ohio has clearly and definitely fixed as the "trial term" the one at which by the time fixed for pleading the issues should be made up. This is the only construction that can be given to this legislation, and we may add, there is no decision of the Ohio Supreme Court giving to it any other construction.

Counsel for appellant argues that the right to remove the cause did not accrue until the reply was filed, because then for the first time, a question arose under a law of

the United States. This view seems to proceed on the assumption that a suit does not arise under a law of the United States within the meaning of the Act, until the cause of action or defense claimed to be under that law is in some manner on the record controverted by the opposite party. We cannot assent to this construction of the Act.

The answer in this case sets out all the proceedings in Bankruptcy which are claimed to be a defense to the suit. If not in the answer, then certainly nowhere else in the record, does it appear, that the suit is one arising under the Bankrupt Law.

If a *defense* arising under a law of the United States can be said to be within the meaning of the Act, then it might with some force be urged, that the answer standing by itself, shows the presence in the case of a federal question.

It is evident that this was the view taken by appellant's counsel at the time he filed the petition for removal, for he there says: (*Record*, page 37,) "that the defense of petitioner in said cause which was made *by answer* filed in due time, is one arising under the Constitution and Laws of the United States." Before the Court was asked to remove the cause, the plaintiffs filed a reply which, not denying the matters contained in the answer, alleged that as to all of said matters, the defendant was concluded by the former adjudication.

We claim from the record as presented to the Court at the time of the application for removal, it appeared that the suit did not arise under the Bankrupt Law, however it may have been before the reply was filed.

But whether this view be correct or not, it is clear that if the suit can be said to arise under the Bankrupt Law,

that fact existed when the suit was brought, and certainly appeared on the record when the answer was filed.

The right to remove a cause does not depend upon the manner in which the facts are brought to the attention of the Court. If the petition for removal is filed in time and the record shows at the time the application is made that the suit arises under a Law of the United States, that is sufficient. It is not necessary that the facts appear in the pleadings. They may appear solely in the petition for removal.

Gold Co. vs. Keyes, 96 U. S., 203.

As the petition for removal may be filed at any time after the suit is brought "*before* or at the term at which it could be first tried," it follows that the defendant was not bound to wait for the reply.

The object of this provision of the Act was to prevent the delay which, experience had shown, was ordinarily occasioned by removals under previous statutes. Within the time fixed by law the facts may be brought before the Court in any appropriate form, and within this time they *must* be so brought.

Counsel lays considerable stress upon the fact that the reply was filed out of rule and without notice to him. This is entirely immaterial. We concede fully that appellant's right to a removal of the cause should not be in the slightest degree prejudiced or affected by the failure to file the reply within rule or by subsequently filing it without leave of Court and without notice. But how was he prejudiced? He had the right to file his petition for removal at any time and was not bound to wait for the reply.

But it is said that until the reply was filed and he had notice of it, he was not aware that his defense would be

contested. If this were true, it would not touch the question. If he desired to remove the cause, it was his duty under the law to act promptly, no matter what were the delinquencies of the other party. He must file his petition for removal before or at the first trial term. What was the first trial term, is the only question.

But it is safe to assume from the record, that the delay in filing the petition for removal was not occasioned by the failure to file the reply within rule. If the answer contained a good defense, the defendant had the right at any time after the plaintiffs were in default for a reply to call up the cause and take judgment on the answer. This right accrued on January 18th, 1879. He failed to exercise this right and took no steps to compel the plaintiffs to file a reply. He must have believed, if in fact he did not know, that a reply would be forthcoming, as soon as the exigencies of the case should require it.

We maintain that under the Ohio practice, the time when the issue was actually made up is immaterial.

But, even if it were material, the issue was certainly made up when the reply was filed on April 3d, 1879, and the January Term did not adjourn until April 7, 1879.

Here, therefore, there were four days in the January Term in which the cause could be tried *after the issue was made up.*

So that, in any view of the case, the petition for removal was filed too late, and none of the authorities cited by appellant sustain his position.

In *Mich. R. R. Co. vs. Andes Ins. Co., and Phœnix Ins. Co. vs. Saettel supra,* the issues had not been made up at the time the petition for removal was filed, and in the last case no answer even had been filed.

It is true that in our case the reply was filed without leave of Court, and without notice to defendant, but it was a pleading filed in the case and would be so considered unless stricken from the files by order of the Court, so that on April 3, 1879, the issues of the case were fully made up.

Counsel for appellant argues that the cause could not have been tried at the January Term, 1879, after the reply was filed on April 3d, because the Court had ceased to try causes as early as March 24th.

But the Court was in session until April 7th, and the authorities are numerous and uniform that the application for removal must be filed at the first term at which under the legislation of the State the cause could be tried, although it is not reached for trial and although the Court and parties are not ready to try it. In other words the "term" under the Act means the term at which the case could *legally* be tried, not actually.

Gurnee vs. Brunswick, 1 Hughes, 271.

Warner vs. Penn. R. R. Co., 13 N. Y. Sup. Ct., 197.

N. Y. W. & S. Co. vs. Loomis, 122 Mass., 431.

C. B. & Q. R. R. Co. vs. Welsh, 44 Iowa, 665.

Huddy vs. Havens, U. S. C. C., S. D. of Pa., April 21, 1877, Vol. 4, Weekly Notes Cases, page 20.

And if it is the first term at which by law the cause could be tried, it certainly makes no difference for what reason it is not actually tried.

THIRD.

The bond filed in the State Court at the time of filing the petition for removal was not in compliance with the law.

Section 3 of Act of March 3d, 1875 provides as follows,

"and shall make and file *therewith* a bond with good and sufficient surety for his or their entering in such Circuit Court on the first day of its then next session, a copy of the record in such suit *and for paying all costs that may be awarded by the said Circuit Court, if said Court shall hold that such suit was wrongfully or improperly removed thereto.*"

The bond in this case omits that part of above condition which is in italics. This defect is fatal.

The requirements as to the nature of the bond extend to all cases mentioned in the 2d section. The filing of the bond conditioned as required by the Act is a *condition precedent* to the removal of the cause. If the required bond has not been filed, the Circuit Court has no jurisdiction. The bond omitted clause as to paying costs and was held to be fatally defective.

McMurdy vs. Conn. Life Ins. Co., U. S. Cir. Ct. E. D. of Pa., (McKennan & Cadwallader, J. J.) Vol. 4, Weekly Notes of Cases, page 18.

The jurisdiction of a State Court over a controversy rightfully in its possession, cannot be dislodged, except by fully complying with the requirements of the Acts of Congress. The bond in this case was held to be insufficient, and the cause was remanded.

Burdick vs. Hale, 7 Bissell, 96.

The reasoning and conclusions of Judge Gresham, seem to us to be unanswerable.

A bond filed for removal of a cause under the Act of March 3d, 1875, contained no provision for costs. *Held*, that it was not such a bond as is required by section 3 of said Act, and that therefore the suit was not properly removed. The Court say: "The filing of the bond conditioned as required by the Act of 1875, is a

condition precedent to the removal of the cause to the Federal Court, and if the required bond has not been filed, that Court has no jurisdiction, although it belongs to that Court exclusively and not to the State Court to decide that fact."

Torrey vs. Grant Locomotive Works, 14 Blatchford, 269.

The bond in this case is conditioned, that Babbitt "shall do such other appropriate acts as by the Act of Congress in that behalf are required to be done upon the removal of such suit from said State Court to the United States Court."

This does not satisfy the requirements of the Statute.

A correct test would be to inquire whether the surety on the bond would be liable for the costs in case the Circuit Court should remand the case and award the costs against the petitioner. Clearly he would not be. The payment of these costs is not "an act required to be done *upon* the removal of the cause," and therefore he has not undertaken that Babbitt will pay these costs.

The finding by the State Court that the bond is in due form, is not conclusive. The Court may look at the record of the bond.

Counsel for appellant cites the following passage from "*Dillon on Removal of Causes*," page 65. "If the Circuit Court should hold that the suit was removable, it would not *probably* dismiss or remand it, because the bond did not contain this condition as to costs or was otherwise informal."

The only authority cited to sustain the text is *Osgood vs. R. R. Co.*, 6 Bissell, 330. In this case the bond was conditioned as required by the Act of Congress, and was perfectly regular. The petition and bond for removal were filed in vacation, and the record was filed in the

United States Court without any action of the State Court. The question to be decided was whether any action of the State Court was necessary. The Court say (Drummond J.) page 336: "The Act prescribes the manner in which the removal shall be made, *and the directions of the law should be complied with.* But the 5th section does not authorize the Court to remand or dismiss the case for the reason that it may appear that there was any irregularity in the means taken to procure the removal. If this Court has jurisdiction of the case, it should retain it, notwithstanding there might be defects in the manner of removal." Again on page 344, "*There is no complaint made against the sufficiency of the bond. If the petitioner has brought himself and is within the terms of the law and the right of removal is complete,* then when the copy of the record is filed, the act of removal is complete." We submit that by this language the learned Judge intended nothing more than that filing the record in the United States Court without any action of the State Court on the petition and bond for removal, if an irregularity, is not such an one as of itself would authorize the Court under said section 5 to remand the cause.

We think that in *McLean vs. R. R. Co.*, 16 *Blatchford*, 309, the Court have given the true construction of said section 5.

In this case the first day of the next term of the United States Court after removal, was April 7th, 1879. The copy of the record was not filed until April 10th, 1879. Judge Blatchford, says: "The case of *Bright vs. R. R. Co.*, 14 Blatchford, 214, is authority for holding that there is nothing in section 5 of the Act of 1875 which prevents

this Court from remanding the cause. The case of *Osgood vs. R. R. Co.*, 6 Bissell, 330, was on the facts involved in the decision of it, not like the present case. In regard to what is said in the case in 6 *Bissell*, respecting the authority of the Circuit Court since section 5 of Act of 1875 was enacted, to dismiss and remand a cause, it may be observed that the provisions are *enabling*, and not prohibitory, and that they are not such as to indicate any intention in Congress to take away from the Circuit Court the power of remanding a cause to the State Court, on the ground that the prescribed pre-requisites necessary to authorize the Circuit Court to proceed, have not been complied with."

Attempt has been made in this case to cure this defect in the bond, by filing an "additional bond," so-called, containing the condition as to costs.

The Statute (section 3 of Act of March 3d, 1875,) requires the bond to be filed *with the petition*, and the copy of the record to be filed in United States Court on the first day of its then next session, or in a single case, (section 7,) the copy of the record may be filed in the United States Court within twenty days after filing the petition for removal.

The petition and bond for removal were filed in the State Court on May 17th, 1879. On May 28, 1879, the State Court ordered the cause removed. The first day of the next term of the United States Court was June 3d, 1879. The copy of the record was under said section 7 filed in the United States Court on June 5th, 1879. On June 24th, 1879, the plaintiffs filed their motion to remand, on the ground, with others, that the bond for removal was defective. On September 1st, 1879, the defendant filed the "additional" bond with the

Clerk of the State Court in vacation. On September 17th, 1879, a transcript of the "additional" bond was filed in United States Court, and on September 18th, 1879, the motion to remand was heard.

We claim that the "additional" bond and transcript thereof are improperly in the case, and that they are both wholly unauthorized and of no effect.

The corrected bond was not filed with the petition as required by law, and was filed long after the time for removing the cause had expired. The record of the corrected bond was not filed in the United States Court on the first day of its next term, or within twenty days after filing the petition for removal, or until long after the time for filing such record had expired.

There was and could have been no leave of Court to file the corrected bond or transcript, and the Circuit Court could not properly regard either as a part of the removal proceedings.

It is no answer to this to say, if true, that it is a good common law bond, and that the surety thereon is liable for the costs awarded against the principal by the remanding Court. The Statute requires the bond for removal to contain certain conditions and to be filed at a certain time. A bond containing other conditions or filed at another time is utterly void as a part of the removal proceedings, whatever force or effect it may have outside of the Statute.

Counsel cites the case of *Parker vs. Overman*, 18 How, 137. In this case the main question as to jurisdiction was whether a proceeding under a statute of Arkansas was a "case" over which the Court could take jurisdiction. The case arose under the Judiciary Act of 1789. After disposing of this question the Court incidentally

allude to the fact that the petition for removal averred "residence" but not "citizenship," and say, "as the record was afterwards so amended as to show conclusively the citizenship of the parties, the Court below had, and this Court have undoubted jurisdiction of the case." This is all there is in the report of the case as to the amendment of the record. It nowhere, appears how, when or by what authority the record was amended. It may have been amended within time, in the State Court before removal, and by leave of Court. But assuming that it was amended in the Circuit Court after removal, it is not an authority in this case. The record was amended to conform to the fact, in other words to show a fact actually existing at the time the petition for removal was filed, and upon which the State Court acted in ordering the removal. Under the Judiciary Act of 1789, the petition for removal was not required to contain any particular averments, although the facts necessary to authorize the removal must exist, and should properly appear somewhere in the record. But to present an analogous case, suppose that no petition whatever for the removal had been filed, and in the absence of such petition the cause was removed, and docketed in the United States Court, could it be claimed that by filing a petition after the time for removing the cause had expired, the Court could acquire jurisdiction? Or suppose the statute required the petition to contain particular averments, or to be in a certain form at the time it is filed, and in some material respect it is not in compliance with the law, would the Court say that by amendment after the time for removal has passed, this defect could be remedied?

So we say, under the Act of March 3d, 1875, the bond must be filed at the same time with the petition, and must

contain certain conditions. A bond omitting these conditions is under the Statute no bond at all. The filing of an additional bond is no amendment of the record. It is merely attempting to do now what the law says should have been done long ago.

If the case was properly removed, so far as the bond is concerned, no amendment is necessary. If it was improperly removed, there is nothing to amend and it should be remanded.

Burdick vs. Hale, 7 Bissell, 96.

For these reasons the order of the Circuit Court remanding this cause to the State Court was right and should be affirmed.

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